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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 6, 2020

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OF

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David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Jennifer C. Peterson
Alyssa M. Chen

COURT OF APPEALS

CASES REPORTED

FILED 19 FEBRUARY 2019

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

MARK STEVEN BEZZEK, PLAINTIFF
v.
SHERRY LEE BEZZEK, DEFENDANT

No. COA18-761

Filed 19 February 2019

Appeal and Error—interlocutory appeal—validity of separation agreement

An appeal was dismissed as interlocutory where the only substantive issue was the validity of a separation agreement, the order on appeal did not fall within those set forth in N.C.G.S. § 50-19.1 for which an interlocutory appeal may be taken, the trial court did not certify the claim for immediate appeal, and the wife made no claim of a substantial right that would be lost without immediate appeal. The Court of Appeals chose not to issue a writ of certiorari on its own motion.

Appeal by defendant from order entered 27 February 2018 by Judge Joseph M. Buckner in District Court, Orange County. Heard in the Court of Appeals 30 January 2019.

No brief filed for plaintiff-appellee.

M. Noah Oswald, for defendant-appellant.

STROUD, Judge.

In April of 2016, plaintiff filed a complaint for absolute divorce and equitable distribution. On 31 May 2016, defendant filed an answer to the

complaint which admitted the allegations relevant to absolute divorce but also included a motion to dismiss the claim for equitable distribution, alleging the parties had entered into a "Separation Agreement" ("Agreement") which "addressed the matters of equitable distribution" and thus "waived their right to equitable distribution by the express terms thereof." On 28 June 2016, the trial court entered an order of absolute divorce acknowledging the Agreement but ultimately reserving the issue of equitable distribution for further proceedings.

On 2 December 2016, plaintiff filed a motion to rescind or set aside Agreement based upon fraud, duress, undue influence, Wife's failure to disclose assets, unconscionability, and in the alternative, impossibility of performance. Husband also filed a motion for establishment of child support, alleging that he was unable to pay the child support established by the Agreement and requesting the trial court to set child support according to the North Carolina Child Support Guidelines. The trial court held a hearing on Husband's motion to set aside the Agreement on 23 August, 5 September, and 28 September 2017, and on 27 February of 2018, the trial court entered an order with extensive findings of fact regarding Wife's fraud; failure to disclose many assets to Husband, in breach of paragraph 14 of the Agreement; duress; undue influence; unconscionability; and impossibility. The trial court concluded that Husband was entitled to relief and that the Agreement was void. The trial court decreed that:

> 1. The June 25, 2015 Contract of Separation and Martial Settlement Agreement is rescinded, set aside, and void and of no legal effect;
>
> 2. Plaintiff may proceed on his claim of Equitable Distribution.

Defendant filed a notice of appeal from the 27 February 2018 order. In the "STATEMENT OF GROUNDS FOR APPELLATE REVIEW" in her brief, Wife claims simply that "Judge Buckner's February 27, 2018 Order is a final judgment from a district court in a civil action, and appeal therefore lies to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b)." But the order is not a final order, since the equitable distribution claim is still pending before the trial court.[1]

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be determined between

1. The motion for establishment of child support was also still pending according to our record.

> them in the trial court. An interlocutory order, on the other hand, is one made during the pendency of an action which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Cagle v. Teachy, 111 N.C. App. 244, 246–47, 431 S.E.2d 801, 803 (1993) (citation omitted).

> When an appeal is interlocutory and not certified for appellate review pursuant to Rule 54(b), the appellant must include in the statement of grounds for appellate review sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right. Otherwise, the appeal is subject to dismissal.

Peters v. Peters, 232 N.C. App. 444, 447, 754 S.E.2d 437, 440 (2014) (citation, quotation marks, and brackets omitted).

Wife has the burden of establishing a right to appeal this interlocutory order:

> Rule 28(b) of the North Carolina Rules of Appellate Procedure provides, in relevant part:
>
> > An appellant's brief shall contain a statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.
>
> While our Supreme Court has held that noncompliance with nonjurisdictional rules such as Rule 28(b) normally should not lead to dismissal of the appeal, when an appeal is interlocutory, Rule 28(b)(4) is not a nonjurisdictional rule. Rather, the only way an appellant may establish appellate jurisdiction in an interlocutory case (absent Rule 54(b) certification) is by showing grounds for appellate review based on the order affecting a substantial right.

Edwards v. Foley, ___ N.C. App. ___, ___, 800 S.E.2d 755, 756 (citations, quotation marks, ellipses, and brackets omitted), *writ of supersedeas and petition for disc. review denied*, 370 N.C. 377, 807 S.E.2d 571 (2017).

The trial court did not certify the order for review under Rule 54(b), so Wife must show that she has

> been deprived of a substantial right pursuant to N.C. Gen. Stat. §§ 1–277 and 7A–27(d)(1). This Court has stated that to be immediately appealable on the foregoing basis, a party has the burden of showing that: (1) the judgment affects a right that is substantial; and (2) the deprivation of that substantial right will potentially work injury to him if not corrected before appeal from final judgment. Whether a substantial right will be prejudiced by delaying appeal must be determined on a case by case basis.

Collins v. Talley, 135 N.C. App. 758, 760, 522 S.E.2d 794, 796 (1999) (citation omitted). Wife has made no argument of any deprivation of a substantial right that would be lost without immediate appeal, so she has not carried her burden under Rule 28. *See Edwards*, ___ N.C. App. at ___, 800 S.E.2d at 756.

In the absence of showing deprivation of a substantial right, although not mentioned by defendant, this Court has jurisdiction to review some interlocutory family law orders under North Carolina General Statute § 50-19.1, but an order ruling upon the validity of a separation agreement is not specifically enumerated as one such order:

> Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, the validity of a premarital agreement as defined by G.S. 52B-2(1), child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.

N.C. Gen. Stat. Ann. § 50-19.1 (2018).[2] The order on appeal does not fall within the types of orders set forth in N.C. Gen. Stat. S 50-19.1, and

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2. North Carolina General Statute § 50-19.1 was first adopted in 2013, and it originally did not include "the validity of a premarital agreement as defined by G.S. 52B-2(1)" in the list of orders for which an interlocutory appeal could be taken; this language was added by an amendment in 2018. *See* N.C. Gen. Stat. § 50-19.1 Editor's Note. North Carolina General Statute § 52B-2(1) defines a "Premarital agreement" as "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage." N.C. Gen. Stat. § 52B-2(1) (2017).

we cannot simply add the validity of a separation and property settlement agreement to this list.

We have also considered whether we should suspend the requirements of the Rules of Appellate Procedure to grant review by certiorari under Rule 2.

> Rule 2 of the North Carolina Rules of Appellate Procedure permits this Court to suspend or vary the requirements of the Rules to prevent manifest injustice to a party, or to expedite decision in the public interest. We exercise our authority under Rule 2 to consider the parties' appeals as petitions for certiorari, and we grant certiorari to review the trial court's interlocutory order.

Brown v. City of Winston-Salem, 171 N.C. App. 266, 269–70, 614 S.E.2d 599, 601–02 (2005) (quotation marks and brackets omitted). We have also considered treating Wife's brief as a petition for certiorari and allowing review under Rule 2, but in our discretion, we decline to do so. *See State v. Campbell*, ___ N.C. App. ___, ___, 810 S.E.2d 803, 814 ("The decision to allow review under Rule 2 is discretionary[.]"), *writ of supersedeas and disc. review allowe*d, ___ N.C. ___, 813 S.E.2d 849 (2018). First, Wife did not request a suspension of the Rules under Rule 2. Also, Husband did not file a brief in this appeal, and he may have decided not to file a brief in reliance upon Wife's failure to establish this court's jurisdiction to consider her appeal.

"It is the court's duty to dismiss an appeal *sua sponte* when no right of appeal exists." *Collins*, 135 N.C. App. at 762, 522 S.E.2d at 798. Since the validity of the Agreement is the only substantive issue addressed in the order appealed, and Wife has not made any argument regarding deprivation of a substantial right, we must dismiss this appeal as interlocutory. *See Peters*, 232 N.C. App. at 447, 754 S.E.2d at 440.

DISMISSED.

Judges DIETZ and BERGER concur.

RICHARD ALAN BRODKIN, PLAINTIFF
v.
NOVANT HEALTH, INC., FORSYTH MEMORIAL HOSPITAL, INC., VOLKER STIEBER, STEPHEN J. MOTEW, TIMOTHY S. COLLINS, AND THOMAS H. GROTE, DEFENDANTS

No. COA18-805

Filed 19 February 2019

1. Contracts—employment—terminable without cause—change of terms—doctor's treatment practices

Defendant-hospital was entitled to summary judgment on plaintiff-oncologist's breach of contract claim where the hospital demanded that the oncologist agree to limit some of his cancer treatment practices or else be fired. Even though the oncologist's employment contract gave him "exclusive control over decisions requiring professional medical judgment," the contract was terminable without cause, and the hospital merely indicated that it would terminate the contract unless the oncologist agreed to change the terms.

2. Employer and Employee—contract terminable without cause—wrongful discharge—public policy—doctor's decisions harmful to patients

Defendant-hospital was entitled to summary judgment on plaintiff-oncologist's claim for wrongful discharge where the employment contract was terminable without cause. Even assuming public policy protected doctors' independent judgment, such a policy would not prohibit a hospital from firing a doctor whose medical decisions, in the hospital's view, were harmful to patients.

3. Fraud—employment contract—exercise of professional medical judgment—termination for refusal to limit treatment practices

Defendant-hospital was entitled to summary judgment on plaintiff-oncologist's fraud claim where the hospital terminated the oncologist's employment for his refusal to agree to limit some of his treatment practices. The oncologist's employment was terminated many years after the parties entered the employment contract (which provided that the oncologist would "have exclusive control over decisions requiring professional medical judgment"), and there was no indication that the hospital intended to prevent the oncologist from exercising his independent medical judgment at the time the parties entered the contract.

4. Contracts—tortious interference with contract—employment contract—professional judgment clause—investigation for legitimate reasons

Defendant-doctor was entitled to summary judgment on plaintiff-oncologist's tortious interference with contract claim where plaintiff-oncologist argued that defendant-doctor induced defendant-hospital not to afford him his right to exercise his own professional medical judgment, which breached the professional judgment clause in his employment contract. The hospital's administrators had asked defendant-doctor to investigate concerns about plaintiff-oncologist's treatment of patients, and there was no evidence that defendant-doctor pursued the investigation for any reason other than his legitimate interest in carrying out his own role at the hospital.

5. Libel and Slander—defamation—doctor's treatment of patients—qualified privilege

Defendant-doctor was entitled to summary judgment on plaintiff-oncologist's claim for defamation where defendant-doctor emailed a hospital administrator to express concerns about plaintiff-oncologist's treatment of patients. Even assuming the email was defamatory, it was protected by qualified privilege—it addressed a legitimate concern, nothing indicated that it was sent with malice or bad faith, it was limited in scope, and it was directed to the proper party.

Appeal by plaintiff from orders entered 30 June 2017 by Judge John O. Craig and 1 February 2018 by Judge Anderson D. Cromer in Forsyth County Superior Court. Heard in the Court of Appeals 14 November 2018.

David B. Hough, P.A., by David B. Hough, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough LLP, by G. Gray Wilson and Linda L. Helms, for defendant-appellee Volker Stieber.

Constangy, Brooks, Smith & Prophete, LLP, by Kristine M. Sims and William J. McMahon, IV, for defendants-appellees.

DIETZ, Judge.

Dr. Richard Alan Brodkin was an oncologist treating cancer patients at Forsyth Memorial Hospital[1] in Winston-Salem. In 2014, other

1. Forsyth Memorial Hospital is the legal name of the hospital, which the record indicates presently does business under the name Novant Health Forsyth Medical Center.

oncologists at the hospital became concerned about Dr. Brodkin's use of a treatment known as "induction chemotherapy." Ultimately, following disagreements in a collaborative meeting intended to ensure best practices, one of the other oncologists took his concerns to the head of the department. This resulted in a series of discussions, investigations, and reports that led the hospital to present Dr. Brodkin with an ultimatum: sign a letter agreeing to limit some treatment practices, or be fired.

When Dr. Brodkin refused to sign the letter, the hospital terminated his employment. Dr. Brodkin then filed this lawsuit, which included claims for breach of contract, wrongful discharge, tortious interference, fraud, and defamation. The trial court granted summary judgment in favor of the Defendants on all claims, and this appeal followed.

As explained below, the bulk of Dr. Brodkin's claims fail because his employment contract was terminable without cause and the hospital's decision to terminate the contract was neither a breach of contract nor a violation of our State's public policy. The fraud claim fails because there is no evidence of fraud in this record. The defamation claim fails because the challenged statements are protected by qualified privilege. Thus, because the trial court properly concluded that the defendants were entitled to judgment as a matter of law on all claims, we affirm the court's order.

Facts and Procedural History

In 2010, Forsyth Memorial Hospital purchased Dr. Richard Alan Brodkin's oncology practice. As part of the purchase, Dr. Brodkin became an employee of the hospital. When he began employment, he signed a contract entitled "Physician Employment Agreement." The contract contained various terms of the parties' employment relationship. The contract was terminable without cause by either party and had no definite term.

As part of his employment duties as an oncologist, Dr. Brodkin attended collaborative meetings with other hospital physicians who treat cancer patients. Together, these physicians would review patients' case files to ensure that the hospital's patients were receiving the best treatment possible. The meetings were referred to as "Tumor Board" meetings.

This case arose out of a disagreement among physicians attending these Tumor Board meetings. Some of Dr. Brodkin's fellow oncologists, including Dr. Volker Stieber, were concerned that Dr. Brodkin's use of a treatment known as "induction chemotherapy" was inconsistent with

National Comprehensive Cancer Network guidelines—a set of guidelines that reflected recommended treatment approaches from experts around the country—and that these induction chemotherapy treatments were not the appropriate course of treatment for Dr. Brodkin's patients.

Ultimately, Dr. Stieber complained to Dr. Susan Hines, the head of medical oncologists at the hospital. Dr. Hines asked Dr. Stieber to provide a list of patients who were impacted, and a description of Dr. Stieber's concerns with those patients' treatment. In response, Dr. Stieber prepared an email that summarized Dr. Brodkin's care of ten patients and explained why Dr. Stieber and some of his colleagues disagreed with those treatment decisions. Dr. Stieber's email did not reference Dr. Brodkin by name but it described the induction chemotherapy treatments provided to ten of Dr. Brodkin's patients and explained that Dr. Stieber and his "group" of physicians had concerns about whether this was the appropriate course of treatment. Dr. Stieber sent the email directly to Dr. Hines, copying Dr. Dawn Moose, but the record indicates that the email eventually circulated to other employees of the hospital.

In November 2014, Dr. Timothy Collins, the hospital's oncology service line lead, and Dr. Thomas Grote, the hospital's oncology practice lead, met with Dr. Brodkin to discuss Dr. Stieber's email. According to Dr. Brodkin, he was unaware of Dr. Stieber's email until this November meeting. Dr. Collins gave Dr. Brodkin one week to respond to the issues identified in Dr. Stieber's email and told him that Dr. Grote would later evaluate the situation and make a recommendation. Dr. Brodkin spent days reviewing his patients' records and preparing a response, which he then submitted to Dr. Grote.

Later, at the request of Dr. Collins and other supervisory staff at the hospital, Dr. Grote began a further review of Dr. Brodkin's patient care by forming a committee that consisted of oncologists from various specializations. The committee prepared a report with a series of forward-looking recommendations for Dr. Brodkin's treatment of patients.

On 4 February 2015, Dr. Stephen J. Motew, a hospital administrator, met with Dr. Brodkin and gave him a letter outlining the hospital's expectations moving forward. The expectations letter stated that Dr. Brodkin must follow the National Comprehensive Cancer Network guidelines "in virtually every case" and that if he departed from those guidelines in treating a patient he must first take the issue to the "tumor board for multidisciplinary discussion and approval." The letter stated that "[b]eginning immediately, you will follow the expectations outlined above providing patient care pursuant to the guidelines."

Dr. Motew told Dr. Brodkin that, if he did not sign this expectations letter, the hospital would terminate Dr. Brodkin's employment. Dr. Brodkin refused to sign the letter because he believed that "he was being punished, because other people's interpretation of the [NCCN] guidelines was not correct" and "the expectations were ridiculous, because [he] followed the guidelines in every case." Two days later, Dr. Brodkin circulated a lengthy email to his fellow medical oncologists at the hospital in which he explained why he believed his induction chemotherapy treatments were appropriate.

On 26 February 2015, Dr. Grote and Dr. Collins sent a letter to Dr. Motew discussing Dr. Brodkin's refusal to sign the expectations letter and stating that "[s]ince [Dr. Brodkin] is unwilling to sign this letter and commit to the group's consensus of our Standard of Care, we support his termination of employment at this time." On 27 February 2015, Dr. Motew again met with Dr. Brodkin and asked that he sign the letter. Dr. Brodkin refused. Dr. Motew then offered Dr. Brodkin the opportunity to resign, which Dr. Brodkin declined. The hospital then terminated Dr. Brodkin's employment.

Dr. Brodkin later sued the Defendants, asserting claims including breach of contract, wrongful discharge, fraud, tortious interference with contract, and defamation. After an opportunity for full discovery, the trial court granted summary judgment in favor of the Defendants on all claims in orders entered 30 June 2017 and 1 February 2018. Dr. Brodkin timely appealed.

Analysis

Dr. Brodkin argues that the trial court erred by granting summary judgment in favor the Defendants on each of the claims he asserted in this action. This Court reviews an appeal from summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). When considering a summary judgment motion, we view the evidence in the light most favorable to the non-movant. *Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

I. Breach of Contract Claim

[1] We begin with Dr. Brodkin's breach of contract claim. To establish a breach of contract claim, there must be: (1) the existence of a valid

contract and (2) a breach of a contractual term. *McKinnon v. CV Indus., Inc.*, 213 N.C. App. 328, 333, 713 S.E.2d 495, 500 (2011).

Our analysis of this claim involves two separate clauses in the employment contract, and we quote the relevant contract language here for ease of understanding. First, the contract provides that Dr. Brodkin "will have exclusive control over decisions requiring professional medical judgment":

> 3. DUTIES AND EXTENT OF SERVICES
>
> a. Practice of Medicine. . . . Physician shall exercise independent professional judgment in the treatment and care of patients and, in this regard, will have exclusive control over decisions requiring professional medical judgment.

Second, the contract provides that either party may terminate it without cause by providing 90 days' notice:

> 14. TERMINATION OF EMPLOYMENT
>
> . . .
>
> b. Termination Without Cause. Either party may terminate Physician's employment without cause by providing the other party at least ninety (90) days' written notice of its intention to terminate, such termination to be effective as of the date specified in the notice, but not prior to the expiration of the ninety (90) day notice period.

Dr. Brodkin's argument is straightforward. He contends that, when the hospital presented him with the expectations letter and demanded that he sign it or be fired, the hospital breached the contract. He argues that the expectations letter would have required him to pursue courses of treatment with which he disagreed, thus eliminating his exclusive control over decisions involving his professional medical judgment. Because the contract guaranteed that he would retain exclusive control of his medical judgment, Dr. Brodkin contends that the hospital's demand to sign the expectations letter breached the contract.

The flaw in this argument is that, even assuming Dr. Brodkin's interpretation of the professional judgment clause is correct (the hospital disagrees with that interpretation), there is no evidence that the hospital ever prevented Dr. Brodkin from exercising his professional judgment, or that it took any disciplinary action against him for exercising that independent judgment. The hospital only sought to monitor (and

potentially restrict) Dr. Brodkin's *future* treatment decisions. It did so by requesting that Dr. Brodkin agree to either amend the contract or waive the professional judgment clause as a condition of continuing the parties' contractual relationship (which the hospital could terminate at any time).

Put another way, what happened here is what happens in countless contract relationships that are terminable without cause at any time: one party indicated that it would need to terminate the contract unless the parties agreed to change the terms. So long as the party requesting the change has not yet materially breached the contract (as is the case here), requesting an amendment or waiver of an otherwise binding contract term is not a breach. *See*, *e.g.*, *Varnell v. Henry M. Milgrom*, *Inc.*, 78 N.C. App. 451, 454, 337 S.E.2d 616, 618 (1985). Thus, because the hospital had not breached the contract at the time it terminated without cause, the trial court properly determined that the hospital was entitled to judgment as a matter of law on Dr. Brodkin's breach of contract claim.

II. Wrongful Discharge Claim

[2] We next address Dr. Brodkin's claim that his termination for refusing to sign the expectations letter violated North Carolina public policy and thus amounted to wrongful discharge. Ordinarily, an employee whose contract is terminable without cause "has no claim for relief for wrongful discharge." *Privette v. Univ. of North Carolina at Chapel Hill*, 96 N.C. App. 124, 133, 385 S.E.2d 185, 190 (1989). But there is a limited exception to this rule where the termination runs contrary to our State's public policy. *Considine v. Compass Grp. USA*, *Inc.*, 145 N.C. App. 314, 317, 551 S.E.2d 179, 181 (2001). To prevail, "the employee has the burden of pleading and proving that the employee's dismissal occurred for a reason that violates public policy." *Id.*

Dr. Brodkin has not met that burden here. He contends that N.C. Gen. Stat. § 90-14(a)(6), a statute that protects physicians from certain regulatory discipline for pursuing experimental treatments, demonstrates a North Carolina public policy in favor of safeguarding physician independence. But even assuming this is true—an issue we need not address today—that would not prevent a hospital from discharging an employee whose medical decisions, in the hospital's view, are harmful to its patients.

As the Oregon Court of Appeals has observed, "although [a doctor] may have had a duty to exercise his professional judgment, other doctors had no duty to agree with him, nor did [a hospital] have an obligation to accept [the doctor's] judgment over the judgment of its other

doctors." *Eusterman v. Northwest Permanente, P.C.*, 129 P.3d 213, 220 (Or. App. 2006). Put another way, even assuming there is a public policy protecting physicians' independent judgment, that policy would not force an employer (whether a hospital or other physicians in a shared practice) to continue employing or partnering with a physician whose professional judgment they believe is wrong. Accordingly, we reject Dr. Brodkin's public policy argument and hold that the trial court did not err in granting summary judgment on the wrongful discharge claim.

III. Fraud Claim

[3] We next address Dr. Brodkin's fraud claim. Dr. Brodkin argues that the hospital committed fraud when the parties initially entered into an employment contract nearly a decade ago. He asserts that the hospital never had any intention of affording Dr. Brodkin independent medical judgment, despite the professional judgment language in the contract, and mispresented that fact to Dr. Brodkin during contract negotiations.

To establish a claim of fraudulent misrepresentation, the plaintiff must show: (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) which does in fact deceive; (5) resulting in damage to the injured party. *Taylor v. Gore*, 161 N.C. App. 300, 303, 588 S.E.2d 51, 54 (2003).

Here, there is no evidence in the record that the hospital either falsely represented any material fact concerning the employment contract or intended to deceive Dr. Brodkin about any material fact in the contract. As explained above, at best, the record indicates that the hospital sought to limit some of Dr. Brodkin's treatment methods after other oncologists expressed concerns. This occurred many years after the parties entered into the employment contract. There is nothing in the record from which a reasonable jury could infer that the hospital made any misrepresentations, or intended to deceive Dr. Brodkin, at the time the parties entered into the contract. Accordingly, the trial court properly granted summary judgment on this claim.

IV. Tortious Interference With Contract Claim

[4] We next address Dr. Brodkin's claim that Dr. Grote tortiously interfered with the employment contract. To establish a claim for tortious interference with contract, there must be "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5)

resulting in actual damage to plaintiff." *United Labs, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988).

Dr. Brodkin claims that Dr. Grote induced the hospital not to afford Dr. Brodkin his right to his own professional medical judgment, which in turn breached the professional judgment clause in the contract. This claim fails because, as explained above, the hospital did not breach the contract. Moreover, when the person who allegedly interferes with the contract is an employee of the defendant, the plaintiff must show that the alleged interference was unrelated to a "legitimate business interest" of the employee. *McLaughlin v. Barclays American Corp.*, 95 N.C. App. 301, 308, 382 S.E.2d 836, 841 (1989). Here, the record indicates that hospital administrators tasked Dr. Grote with investigating and addressing concerns about Dr. Brodkin's treatment of patients. There is no evidence in the record that Dr. Grote pursued that investigation for reasons other than his legitimate interest in carrying out his own role within the hospital hierarchy. Accordingly, the trial court properly entered summary judgment on this tortious interference claim.

V. Defamation Claim

[5] Finally, we address Dr. Brodkin's defamation claim against Dr. Stieber. Dr. Brodkin argues that Dr. Stieber defamed him by emailing a hospital administrator expressing concerns about Dr. Brodkin's treatment of patients. Because the communications are protected by the affirmative defense of qualified privilege, we disagree.

"To be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed." *Daniels v. Metro Magazine Holding Co, L.L.C.*, 179 N.C. App. 533, 538–39, 634 S.E.2d 586, 590 (2006). But even if a statement satisfies these criteria for defamation—an issue we need not reach in this case—the defendant can assert the affirmative defense of qualified privilege. *Stewart v. Nation-Wide Check Corp.*, 279 N.C. 278, 283, 182 S.E.2d 410, 414 (1971). Qualified privilege is established if the communication is made in good faith, there is an interest to be upheld, the statement is limited in scope to its purpose, the publication is directed to proper parties, and the statement was not made with malice or through excessive publication. *Harris v. The Proctor & Gamble Mfg. Co.*, 102 N.C. App. 329, 331, 401 S.E.2d 849, 850–51 (1991).

Evening assuming Dr. Stieber's email otherwise would be defamatory (and we are not persuaded that it would be), the email is protected by qualified privilege. The email addressed legitimate concerns Dr. Stieber had with the course of treatment for many of Dr. Brodkin's

patients. Ensuring that cancer patients receive the appropriate medical treatment is unquestionably an important interest for all parties in this lawsuit, including Dr. Stieber. Moreover, there is nothing in the record from which a reasonable jury could infer that Dr. Stieber acted with any malice or bad faith; to the contrary, the record indicates that Dr. Stieber had a good faith disagreement with a fellow cancer doctor about the appropriate course of treatment during a meeting designed to encourage honest debate. Dr. Stieber discussed those concerns with the hospital's head of oncology, who requested that Dr. Stieber compile the concerns in an email. That is precisely what Dr. Stieber did in this case. Accordingly, the trial court properly granted summary judgment on the defamation claim because it is barred by the affirmative defense of qualified privilege.

Conclusion

For the reasons stated above, we affirm the trial court's orders.

AFFIRMED.

Chief Judge McGEE and Judge ARROWOOD concur.

ERIC DENNEY, AND WIFE CHRISTINE DENNEY, PLAINTIFFS
v.
WARDSON CONSTRUCTION, INC., AND HEALTHY HOME INSULATION, LLC, DEFENDANTS

No. COA18-667

Filed 19 February 2019

Appeal and Error—interlocutory appeal—res judicata defense—substantial right—required factual showing

An appeal from a partial summary judgment order rejecting some of defendant construction company's res judicata defenses was dismissed as interlocutory where defendant did not include in the statement of grounds for appellate review an explanation of how the challenged order would create a risk of inconsistent verdicts or otherwise affect a substantial right on the particular facts of the case. Although defendant contended that a ruling by the trial court on a res judicata defense affects a substantial right as a matter of law, the cases cited by defendant did not examine and reject the notion that the appellants must show that the appeal is permissible

based on the particular facts of the case. The Court of Appeals found controlling a separate line of cases requiring an individualized factual showing.

Appeal by defendant from order entered 14 February 2018 by Judge Vince Rozier in Wake County Superior Court. Heard in the Court of Appeals 16 January 2019.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, Jr., and L. Lamar Armstrong, III, for plaintiffs-appellees.

George B. Currin, and Lewis & Roberts, PLLC, by Matthew D. Quinn, for defendant-appellant.

DIETZ, Judge.

Defendant Wardson Construction, Inc. appeals a partial summary judgment order rejecting some of Wardson's res judicata defenses. Wardson concedes that this appeal is interlocutory and, notably, does not assert on appeal that the trial court's partial rejection of its res judicata defense creates any actual risk of inconsistent verdicts—meaning a risk that separate fact-finders reach conflicting results on the same factual issues.

Instead, relying on a handful of decade-old cases, Wardson contends that the denial of a res judicata defense is immediately appealable in every case as a matter of law. As explained below, this argument has been considered and rejected by this Court many times. As we recently reaffirmed, "invocation of res judicata does not automatically entitle a party to an interlocutory appeal of an order rejecting that defense." *Smith v. Polsky*, __ N.C. App. __, __, 796 S.E.2d 354, 359 (2017). For clarity, we once again hold that appellants in interlocutory appeals involving the defense of res judicata must show that the challenged order creates a risk of inconsistent verdicts or otherwise affects a substantial right based on the particular facts of the case. Because Wardson did not do so here, we dismiss this appeal for lack of appellate jurisdiction.

Facts and Procedural History

This dispute began after Eric Denney claimed that Wardson Construction and its subcontractor failed to properly install spray foam insulation during construction of Denney's home. In 2015, Denney sued Wardson and the subcontractor, asserting claims for breach of contract, fraudulent or negligent misrepresentation, and negligence. Defendants

later moved for summary judgment on all claims. In 2016, the trial court granted partial summary judgment for Defendants, dismissing the fraud and negligence claims but permitting the breach of contract claim to proceed. Denney then voluntarily dismissed the suit.

In 2017, Denney and his wife filed a new lawsuit, asserting claims for breach of express warranty, breach of implied warranty, breach of contract, unfair and deceptive trade practices, fraud, conversion, and unjust enrichment. Wardson moved for summary judgment, arguing that all claims in the new lawsuit, except the breach of contract claim, were barred by res judicata.

The trial court again granted partial summary judgment, ruling that the fraud, conversion, and unjust enrichment claims were barred by res judicata, but permitting the remaining claims to proceed. Wardson timely appealed.

Analysis

"Ordinarily, this Court hears appeals only after entry of a final judgment that leaves nothing further to be done in the trial court." *Crite v. Bussey*, 239 N.C. App. 19, 20, 767 S.E.2d 434, 435 (2015). "The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 95 (2015).

There is a statutory exception to this general rule when the challenged order affects a substantial right. N.C. Gen. Stat. § 7A-27(b)(3)(a). To confer appellate jurisdiction in this circumstance, the appellant must include in its opening brief, in the statement of the grounds for appellate review, "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Larsen*, 241 N.C. App. at 77, 772 S.E.2d at 95.

Importantly, this Court will not "construct arguments for or find support for appellant's right to appeal from an interlocutory order" on our own initiative. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). That burden falls solely on the appellant. *Id.* As a result, if the appellant's opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of appellate jurisdiction. *Larsen*, 241 N.C. App. at 79, 772 S.E.2d at 96.

Although this rule seems straightforward in the abstract, it is complicated by different rules concerning *how* a litigant must show that

a substantial right is affected. Some rulings by the trial court affect a substantial right essentially as a matter of law. Sovereign immunity is an example. A litigant appealing the denial of a sovereign immunity defense need only show that they raised the issue below and the trial court rejected it—there is no need to explain why, on the facts of that particular case, the ruling affects a substantial right. *See*, *e.g.*, *Ballard v. Shelley*, __ N.C. App. __, __, 811 S.E.2d 603, 605 (2018).

By contrast, most interlocutory issues require more than a categorical assertion that the issue is immediately appealable. In these (more common) situations, the appellant must explain, in the statement of the grounds for appellate review, why the facts of that particular case demonstrate that the challenged order affects a substantial right.

Wardson acknowledges that this appeal is interlocutory but contends that rejection of a res judicata defense is like rejection of a sovereign immunity defense—meaning there is no need to explain why the facts of this particular case warrant immediate appeal. The company points to a series of decisions from this Court that, in its view, "expressly adopted a bright-line rule" that any order rejecting a res judicata defense is immediately appealable. *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 83, 609 S.E.2d 259, 261 (2005); *Wilson v. Watson*, 136 N.C. App. 500, 501, 524 S.E.2d 812, 813 (2000); *Little v. Hamel*, 134 N.C. App. 485, 487, 517 S.E.2d 901, 902 (1999).

We are not persuaded that these decisions mean what Wardson claims. To be sure, these cases all permitted an immediate appeal of a res judicata issue. But none of these cases examined and rejected the notion that the appellants must show the appeal is permissible based on the particular facts of their case. Instead, the Court in these cases simply held that the appeal was permissible, without a detailed analysis of the distinction between the types of issues that categorically affect a substantial right and those that must be considered on a case-by-case basis. *Moody*, 169 N.C. App. at 84–87, 609 S.E.2d at 261–63; *Wilson*, 136 N.C. App. at 501–02, 524 S.E.2d at 813; *Little*, 134 N.C. App. at 487–89, 517 S.E.2d at 902–03.

More importantly, there is a separate, more specific line of cases holding that an individualized factual showing is required in res judicata cases. As this Court recently reaffirmed, "when a trial court enters an order rejecting the affirmative defense of res judicata, the order *can* affect a substantial right and *may* be immediately appealed." *Smith v. Polsky*, __ N.C. App. __, __, 796 S.E.2d 354, 359 (2017). "Even so, it is clear that invocation of res judicata does not automatically entitle a

party to an interlocutory appeal of an order rejecting that defense." *Id.* Instead, the challenged order affects a substantial right only if there is a risk of "inconsistent verdicts," meaning a risk that different fact-finders would reach irreconcilable results when examining the same factual issues a second time. *Id.*

This line of cases, which includes nearly a dozen decisions over the past two decades, originated with a Supreme Court decision in the early 1990s. *See Bockweg v. Anderson*, 333 N.C. 486, 490–91, 428 S.E.2d 157, 160–61 (1993). In *Bockweg*, after acknowledging that "the right to avoid the possibility of two trials on the same issues" can permit an immediate appeal, the Supreme Court held that rejection of a res judicata defense "may affect a substantial right, making the order immediately appealable." *Id.*

The *Smith v. Polsky* line of cases applied this reasoning and held that rejections of a res judicata defense, while not categorically appealable in every case, *may* be immediately appealable if it creates a risk of inconsistent verdicts. Thus, even assuming there is a conflict between the *Smith v. Polsky* line of cases and the cases cited by Wardson (and, as explained above, we are not persuaded that there is one), we must follow *Smith v. Polsky* because that line of precedent both came first and, over time, expressly addressed and distinguished the reasoning of the cases cited by Wardson. *See State v. Gonzalez*, No. COA18-228, __ N.C. App. __, __, __ S.E.2d __, __, 2019 WL 189853, at *3 (Jan. 15, 2019).

Applying this controlling line of precedent, we again reaffirm that an appellant seeking to appeal an interlocutory order involving res judicata must include in the statement of the grounds for appellate review an explanation of how the challenged order would create a risk of inconsistent verdicts or otherwise affect a substantial right based on the particular facts of that case. *Smith*, __ N.C. App. at __, 796 S.E.2d at 359–60. Wardson did not do so here. The company's arguments are, in effect, simply an assertion that they should not be forced to endure the burden of a trial when they have asserted a defense on which they believe they will prevail on appeal. It is well-settled that "avoiding the time and expense of trial is not a substantial right justifying immediate appeal." *Lee v. Baxter*, 147 N.C. App. 517, 520, 556 S.E.2d 36, 38 (2001). Accordingly, mindful of our duty to avoid "fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts," we dismiss this interlocutory appeal for lack of appellate jurisdiction. *Larsen*, 241 N.C. App. at 76, 772 S.E.2d at 95.

Conclusion

We allow Plaintiffs' motion to dismiss this appeal.

DISMISSED.

Judges BERGER and MURPHY concur.

IN THE MATTER OF THE APPEAL OF AARON'S, INC., APPELLANT. FROM THE DECISION OF THE SAMPSON COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING THE VALUATION OF CERTAIN PERSONAL PROPERTY FOR TAX YEAR 2016 [SIC] [TAX YEARS 2010 THROUGH 2015].

No. COA18-607

Filed 19 February 2019

Taxation—leased property—option to purchase—not "inventories" subject to exemption

A taxpayer's property possessed by a lessee pursuant to a lease purchase agreement was not exempt from taxation because it did not constitute "inventories" held for sale by a merchant pursuant to N.C.G.S. § 105-275(34). The fact that the lease purchase agreement contained an option for lessees to purchase the property did not transform the agreement into a sales contract, since lessees were not obligated to make a purchase. Further, the total cost to purchase the property was significantly higher under the rent-to-own scheme than if it were purchased in a direct sale, demonstrating that the transactions were leases and not sales.

Appeal by Taxpayer from Final Decision entered 1 March 2018 by Chairman Robert C. Hunter in the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 17 January 2019.

Nexsen Pruet, PLLC, by Alexander P. Sands III and George T. Smith III, for Taxpayer-Appellant.

W. Joel Starling, Jr. for Sampson County-Appellee.

ZACHARY, Judge.

Aaron's, Inc. ("Taxpayer") appeals from the Final Decision of the North Carolina Property Tax Commission determining that property in the physical possession of Taxpayer's customers pursuant to "Lease Purchase Agreements" is subject to *ad valorem* taxation. Taxpayer argues that such property constitutes "inventories owned by retail and wholesale merchants," and is thus exempt from taxation pursuant to N.C. Gen. Stat. § 105-275(34). We disagree, and affirm the Final Decision of the Commission.

Background

Taxpayer is a multi-state business with a location in Sampson County at which it offers for sale or lease "property such as furniture, appliances, personal computers and other household electronics." However, Taxpayer derives the vast majority of its revenue from a "rent-to-own" business model rather than from pure "retail sales"; Taxpayer's "Lease Revenues and Fees" ranged between $1.68 billion and $2.68 billion for the years 2012 through 2015, whereas its "Retail Sales" during the same period ranged between only $32.87 million and $40.88 million.

The rent-to-own transactions are effectuated through the execution of Taxpayer's "Lease Purchase Agreement," which provides for monthly or semi-monthly renewal terms, and designates the subject property and the customer as the "leased property" and the "lessee," respectively. Pursuant to the terms of the Lease Purchase Agreement, Taxpayer retains title to, and the lessee obtains possession of, the subject property. While the lessee has a "Purchase Option," the lessee may also "terminate th[e] Agreement without penalty at any time by surrendering or returning the Leased Property in good repair and paying all Renewal Payments and Other Charges through the date of surrender or return."

After conducting an audit, on 6 November 2015, the Sampson County Office of Tax Assessor sent Taxpayer a notice and appraisal assessing a tax deficiency of $2,636,576.00 for the tax years 2010 through 2015. This deficiency was largely the result of Taxpayer's failure to list property that was in the possession of its lessees pursuant to its Lease Purchase Agreements. Taxpayer filed written exception to the deficiency, arguing that the property subject to its Lease Purchase Agreements, as property that was "in the process of being sold," qualified as "inventories" and was therefore exempt from taxation. The Tax Administrator declined to amend the assessment as requested by Taxpayer, and rendered a final decision providing, in pertinent part, that:

> I have reviewed your letter and your opinion that inventory held by [Taxpayer] is excluded from taxation. General

> Statutes 105-273(8a) defines inventories as goods held for sale in the regular course of business by manufacturers, retail and wholesale merchants and construction contractors. The nature of your business tends to be in rental and leasing rather than sales. It is important to note that inventories cannot be held for sale and rent/lease simultaneously. In the audit, there was an adjustment of 10% on inventories allowed for the relatively small portion that was actually sold.
>
> It is my opinion that the inventories for [Taxpayer] are not exempt under the provisions of the Machinery Act of North Carolina and the discovery of the inventories not reported during the listing period will remain in effect.

Taxpayer appealed the Tax Administrator's decision to the Sampson County Board of Equalization and Review, which affirmed the Tax Administrator's decision. Taxpayer thereafter appealed the County Board's decision to the North Carolina Property Tax Commission.

Before the Commission, Taxpayer reiterated its assertion that the property subject to its Lease Purchase Agreements constituted "Inventories owned by retail and wholesale merchants," and was therefore exempt from taxation pursuant to N.C. Gen. Stat. § 105-275(34). By Final Decision entered 1 March 2018, the Commission affirmed the County Board's decision and concluded that "Taxpayer, by renting the equipment to third parties, is not entitled to the inventory tax exclusion for the rented equipment[,] . . . but that said property tax exclusion does apply as to such personal property that is in the actual possession of the [Taxpayer] and available for sale." Taxpayer timely filed written notice of appeal to this Court from the Final Decision of the Commission.

On appeal, Taxpayer argues that the Commission erred in concluding that it is required to list and pay *ad valorem* taxes on the property subject to its Lease Purchase Agreements.

Scope of Appellate Review

The scope of this Court's appellate review of final decisions of the Property Tax Commission is defined by N.C. Gen. Stat. § 105-345.2, which provides, in pertinent part:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of

> any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2017).

Discussion

All real and personal property located in North Carolina is subject to taxation unless otherwise excluded or exempted by statute. *Id.* § 105-274(a)(1). The burden is on the taxpayer to establish that the property in question falls within one of the numerated tax exemptions. *In re Southeastern Baptist Theol. Seminary, Inc.*, 135 N.C. App. 247, 249, 520 S.E.2d 302, 304 (1999). "This burden is substantial and often difficult to meet . . . ." *Id.*

The General Assembly has enacted legislation exempting some categories of property from taxation. One such statute provides for the exemption from taxation of "[i]nventories owned by retail and wholesale merchants." N.C. Gen. Stat. § 105-275(34). "Inventories" are defined, in pertinent part, as "[g]oods held for sale in the regular course of business by . . . retail and wholesale merchants[.]" *Id.* § 105-273(8a)(a). Whether particular property constitutes exempt "inventories" will ultimately depend upon the wording of Section 105-273(8a) and "the use to which the property is dedicated[.]" *In re R.W. Moore Equip. Co.*, 115 N.C. App. 129, 132, 443 S.E.2d 734, 736, *disc. review denied*, 337 N.C. 693, 448 S.E.2d 533 (1994).

In the instant case, Taxpayer maintains that the transfer of its property to the possession of a lessee pursuant to a Lease Purchase

Agreement effects a form of "sale," such as a conditional sale, and that such property thus constitutes exempt inventory under N.C. Gen. Stat. § 105-275(34). We agree with the Commission, however, that the transfer of possession of property following the execution of Taxpayer's Lease Purchase Agreement is not properly categorized as a "sale," and therefore the property held thereunder does not fall within the class of exempt "inventories" described in N.C. Gen. Stat. § 105-275(34).

We reach this conclusion primarily due to the fact that Taxpayer's lessees are, in fact, under no obligation to either purchase the subject property or to pay the "Total Cost to Own" the property pursuant to the terms of Taxpayer's Lease Purchase Agreements. *See Szabo Food Serv., Inc. v. Balentine's, Inc.*, 285 N.C. 452, 461-62, 206 S.E.2d 242, 249 (1974). As our Supreme Court explained in *Szabo*, "[o]ne of the principle tests for determining whether a contract is one of conditional sale or lease is whether the party is obligated at all events to pay the total purchase price of the property . . . ," it being clear that "[i]f the return of the property is either required or permitted, the instrument will be held to be a lease; if the so-called lessee is obligated to pay the purchase price, even though it be denominated rental, the contract will be held to be one of sale." *Id.*

The Lease Purchase Agreements in the instant case provide for a month-to-month "Initial Lease Term," and either monthly or semi-monthly "Renewal Terms." The agreements merely grant to the lessee a "Purchase Option," and the lessee is permitted to "return or surrender the Leased Property" to Taxpayer at any time, without penalty. The fact that the Lease Purchase Agreements contain an *option* to purchase does not render those agreements sales contracts. *Cf. id.* at 462, 206 S.E.2d at 249 ("[I]n order to make a conditional sale, . . . the buyer should be *bound* to take title to the goods, or at least to pay the price for them. Therefore, a lease which provides for a certain rent in installments is not a conditional sale if the lessee can terminate the transaction at any time by returning the property, even though the lease also provides that if rent is paid for a certain period, the lessee shall thereupon become the owner of the property." (emphasis added)). Because Taxpayer's self-denominated "lessees" are not required to ultimately purchase the property under the terms of the Lease Purchase Agreements, we necessarily conclude that such property is not held for the purpose of "sale" within the meaning of N.C. Gen. Stat. § 105-273(8a). *See id.* at 461-62, 206 S.E.2d at 249.

Another indication that the "rent-to-own" transactions do not constitute contracts of sale is the discrepancy between the ultimate "Total

Cost to Own" the property pursuant thereto and the price at which the same merchandise could be purchased via a direct sale. The Supreme Court has held:

> A lease of personal property is substantially equivalent to a conditional sale when the buyer is bound to pay rent substantially equal to the value of the property . . . . [T]hough the rent is to be applied at the buyer's option toward the payment of the price, the transaction is not a conditional sale if the price largely exceeds the rent that the lessee is bound to pay.

Id. at 462, 206 S.E.2d at 249. Here, the record reveals that an item that would ordinarily cost one of Taxpayer's customers $1,639.12 if purchased through a direct sale would cost a lessee $2,917.63—or an additional $1,278.51—if the customer were to purchase that same item by exercising the purchase option under a Lease Purchase Agreement. This substantial increase in cost is consistent with the denomination of Taxpayer's "rent-to-own" transactions as a lease rather than a sale of the property.

In addition, we note that N.C. Gen. Stat. § 105-273(8a) defines "inventories" as "[g]oods *held* for sale in the regular course of business *by* . . . retail and wholesale merchants." N.C. Gen. Stat. § 105-273(8a)(a) (emphases added). As this Court concluded in *R.W. Moore Equipment*, property cannot be found to be " 'held' by [a] [t]axpayer" for sale for purposes of Section 273 when that property is "in the lessee's possession." *R.W. Moore Equip. Co.*, 115 N.C. App. at 132, 443 S.E.2d at 736. In this respect, the property which was subject to Taxpayer's Lease Purchase Agreements could not be said to be tax-exempt inventory, in that it was "held" in the possession of the lessee, rather than Taxpayer, at all pertinent points.

Accordingly, we conclude that once Taxpayer's property was in the possession of a lessee pursuant to the terms of a Lease Purchase Agreement, that property no longer constituted tax-exempt "inventories" pursuant to N.C. Gen. Stat. § 105-275(34). We affirm the Commission's Final Decision in that respect.

Taxpayer lodges additional arguments under N.C. Gen. Stat. § 105-306(c)(2) and N.C. Const. art. V, § 2 (1) and (2). However, those arguments are each dependent upon the classification of the execution of its Lease Purchase Agreements as a form of "sale." Because we conclude that Taxpayer's Lease Purchase Agreements are rental agreements

rather than sales, Taxpayer's arguments under N.C. Gen. Stat. § 105-306(c)(2) and N.C. Const. art. V, § 2 are inapposite.

Lastly, we observe that the Commission's Final Decision appears to contain clerical errors. The Final Decision recites that this matter was heard upon appeal "[f]rom the decision of the Sampson County Board of Equalization and Review concerning the valuation of certain personal property for tax year 2016." However, as Taxpayer notes in its Notice of Appeal to this Court, and as both parties note in their briefs, the record reveals that the instant case "concerns the exemption of business and personal property for the tax years 2010 through 2015." Accordingly, we remand with instructions to correct each of the captions in this matter so that the records appropriately reflect the dates and property involved herein.

Conclusion

We affirm the Final Decision of the Property Tax Commission, but remand for correction of the clerical errors discussed herein.

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Judges TYSON and COLLINS concur.

IN THE MATTER OF THE ESTATE OF CLARENCE MAYNARD JOHNSON

No. COA18-778

Filed 19 February 2019

1. Estates—order denying petition to revoke letters testamentary—appeal to superior court—standard of review

In an appeal from a clerk of court's denial of a petition for revocation of letters testamentary in an estate matter, the superior court erred by failing to conduct a de novo hearing as required by sections 28A-9-4, 28A-2-9(b), and 1-301.2.

2. Estates—order finding deficiency in year's allowance—appeal to superior court—standard of review

In an appeal from a clerk of court's order directing an executor to pay a deficiency in the year's allowance awarded to decedent's spouse, the superior court erred by disregarding the clerk's findings and conducting a de novo review, instead of applying the deferential standard of review required by N.C.G.S. § 1-301.3(d).

Appeal by petitioner from orders entered 9 March 2018 by Judge James M. Webb in Anson County Superior Court. Heard in the Court of Appeals 31 January 2019.

The McCraw Law Firm, PLLC, by Jeffrey M. McCraw, for petitioner-appellant.

Harrington Law Firm, by Larry E. Harrington, for respondent-appellee.

TYSON, Judge.

Stacia Ward Johnson ("Petitioner") appeals two orders of the superior court issued upon review of orders from the clerk of superior court. We vacate both of the superior court's orders and remand.

I. Background

Clarence Maynard Johnson ("Decedent") and Petitioner were married on 14 August 1999. Decedent died testate on 28 September 2014. Decedent's last will and testament dated 5 April 2013 was submitted for probate on 18 November 2014. Decedent's will named one of Decedent's two sons from a prior marriage, Edward Michael Johnson

("Respondent"), as his executor. In his will, Decedent left a residence at 512 North Pine Lane in Wadesboro and one-half of all of his other real property and personal property to Petitioner. The remaining one-half undivided interest was devised to Respondent and Mark Johnson, Decedent's other son by a prior marriage.

Petitioner submitted an AOC-E-100 form for a year's allowance of $30,000.00 as a surviving spouse pursuant to N.C. Gen. Stat. § 30-15 on 14 January 2016. After applying N.C. Gen. Stat. § 30-31, the Anson County Clerk of Superior Court entered an order on 20 January 2016 ("the January 2016 Order") finding Petitioner was "entitled to a year's allowance in the amount of $13,349.50 . . . to be credited against her distributive share." The January 2016 Order also specified that two motor vehicles totaling $3,050.00 in value and an insurance check for damage to another motor vehicle in the amount of $4,097.06 be assigned to Petitioner in partial payment of the year's allowance. After assigning the vehicles and the check, the January 2016 Order specified that a $6,202.44 balance on the $13,349.50 assignment was to be paid from the estate's assets.

Also on 20 January 2016, the Assistant Anson County Clerk of Superior Court signed the section entitled "ASSIGNMENT OF YEAR'S ALLOWANCE" on the AOC-E-100 form submitted by Petitioner. The "ASSIGNMENT OF YEAR'S ALLOWANCE" section of the form contains pre-printed language, which states:

> I have examined the above application and have determined the money and other personal property of the decedent. I find that the allegations in the application are true and that each person(s) named in the application is entitled to the allowance requested.
>
> I ASSIGN to the applicant the funds or other items of the personal property of the decedent listed below, which I have valued as indicated. This property is assigned free and clear of any lien by judgment or execution against the decedent and is to be paid by the applicant to the person(s) entitled. I assess as a DEFICIENCY the amount, if any, shown below, which is to be paid or delivered to the proper person when any additional personal assets of the decedent are discovered.

The form listed the $13,349.50 worth of Decedent's personal property assigned to Petitioner to pay her year's allowance, and noted a deficiency of $16,650.50, the difference between the $30,000.00 year's allowance

provided under N.C. Gen. Stat. § 30-15 (2014) and the $13,349.50 worth of personal property assigned to Petitioner.

On 11 September 2017, Petitioner filed a petition for revocation of letters testamentary issued to Respondent. Petitioner alleged:

> a. [Respondent] has failed to properly handle, manage, and account for estate assets in accordance with the North Carolina General Statutes;
>
> b. [Respondent] has failed to file timely and accurate periodic accountings with the Clerk;
>
> c. The estate has been open for three (3) years and accurate and complete final distributions and a final accounting have yet to be proffered; and
>
> d. These and potentially other failures and circumstances appear to rise to a violation of the fiduciary duty of the [Respondent's] office under NCGS 28A-9-1(3).

A hearing was held on Petitioner's petition on 8 November 2017 before the clerk of superior court. Petitioner asserted Respondent had committed multiple breaches of his fiduciary duties as the estate executor, including failing to satisfy the deficiency on Petitioner's year's allowance before paying lower priority claims on Decedent's estate.

Petitioner also asserted, in part, that: (1) Respondent had failed to include several assets in the estate's inventory, including the contents of two safes owned by Decedent that contained firearms, U.S. currency, and a coin collection; (2) Respondent had improperly included nonprobate real estate transactions within his estate accounting, including the sale of timber from Decedent's real property, real estate rents, and real estate expenses; (3) Respondent had calculated his commissions as executor based upon inflated receipts and disbursements; and (4) Respondent had failed to provide vouchers to support disbursements made from the estate.

At the conclusion of the hearing, the clerk of superior court orally ruled that there was a deficiency of $16,650.50 in Petitioner's year's allowance, and ordered Respondent to issue Petitioner a check for the deficiency. The clerk also ordered an appraisal of Decedent's coin collection and calendared a hearing for 29 November 2017 on the results of the appraisal. The clerk deferred ruling on the removal of Respondent as the executor. Respondent gave oral notice of appeal of the clerk's order on the deficiency payment.

After the hearing, Petitioner filed a new petition for the revocation of Respondent's letters testamentary on 17 November 2017. In the new petition, Petitioner reasserted the arguments she had made for removal of Respondent as the estate executor at the 8 November hearing and in her previous petition.

On 20 November 2017, the clerk of court issued a written order ("the Deficiency Order") which contained findings of fact and conclusions of law. The Deficiency Order required that Petitioner be paid the $16,650.50 deficiency for the year's allowance. The order contained the following relevant findings of fact:

> 6. That on January 20th, 2016 the Anson County Clerk of Superior Court issued an order Assigning Spouse Year's Allowance of $13,349.50 . . . .
>
> 7. That the aforementioned remittance in paragraph #6 of $13,349.50, toward an Assignment of Year's Allowance, did and does cause a remaining deficiency of $16,650.50 to the Spouse's Year's Allowance, per N.C.G.S. 30-15.

Based upon these findings, the clerk of court concluded, in relevant part:

> 8. That on January 20th, 2016 the court approved and ordered a Year's Allowance to be assigned to [Petitioner] in the amount of $13,349.50, leaving a deficiency of $16,650.50, per N.C.G.S. 30-15.

On 19 December 2017, the clerk of court issued an order ("the Revocation Order") denying Petitioner's petition for revocation of letters testamentary granted to Respondent. The Revocation Order contained the following relevant findings of fact:

> 8. The Court has examined the filed reports of the Executor. While sometimes tardy, the Court can find no breach of fiduciary duty, no evidence of bad faith and no misconduct that would justify removal or revocation of letters testamentary.
>
> 9. The Court finds no evidence that [Respondent] has acted in bad faith in carrying out his fiduciary duties as Executor.
>
> 10. The Court finds no evidence that [Respondent] is guilty of misconduct in the execution of his office.

> 11. The Court finds no evidence that [Respondent] has a private interest that might hinder or be adverse to a proper administration of the estate.

The Revocation Order concluded, in part:

> 2. [Respondent] has violated no fiduciary duty through default or misconduct in the execution of his office.
>
> 3. [Respondent] has no private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration of the estate.

Petitioner filed written notice of appeal of the Revocation Order to the superior court, "pursuant to N.C.G.S. §§ 28A-9-4 and 28A-2-9(b) and 1-301.2 or alternatively 1-301.3 . . . ."

The superior court conducted a hearing on Petitioner and Respondent's appeals on 12 February 2018. The superior court issued two orders on 6 March 2018. One order denied Petitioner's petition for revocation of letters testamentary granted to Respondent. The other order allowed Respondent's appeal of the Deficiency Order and declared the Deficiency Order null and void. The superior court ruled that the clerk of court's 20 January 2016 order, which did not specify a deficiency owed to Petitioner, controlled over the Deficiency Order.

Petitioner filed timely notice of appeal of the superior court's two orders.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017).

III. Issues

Petitioner argues the superior court applied the incorrect standards of review to the Revocation Order and the Deficiency Order, which warrants reversal and remand of both orders to the superior court. In the alternative, Petitioner argues the superior court erred in denying her petition for revocation of letters testamentary and in ruling the clerk of court's deficiency order was null and void.

IV. Standard of Review

"On appeal to the Superior Court of an order of the Clerk in matters of probate, the trial court judge sits as an appellate court." *In re Estate of Pate*, 119 N.C. App. 400, 402-03, 459 S.E.2d 1, 2-3 (1995) (quotations

and citations omitted). "The standard of review in this Court is the same as in the Superior Court." *Id.* at 403, 459 S.E.2d at 3. "Errors of law are reviewed *de novo*." *Overton v. Camden Cty.*, 155 N.C. App. 391, 393, 574 S.E.2d 157, 160 (2002) (citation omitted).

We address Petitioner's arguments that the superior court applied the wrong standards of review to each of the clerk of court's orders.

V. Analysis

A. *The Revocation Order*

[1] Petitioner argues the superior court failed to apply *de novo* review to the clerk of court's Revocation Order, which denied Petitioner's petition to revoke letters testamentary granted to Respondent as executor of Decedent's estate.

In her notice of appeal to the superior court, Petitioner appealed "pursuant to N.C.G.S. §§ 28A-9-4 and 28A-2-9(b) and 1-301.2 or alternatively 1-301.3 . . . ."

N.C. Gen. Stat. § 28A-9-4 (2017) provides an "interested person" a right to appeal a clerk of court's order granting or denying revocation of letters testamentary to the superior court. The statute states:

> Any interested person may appeal from the order of the clerk of superior court granting or denying revocation *as a special proceeding pursuant to G.S. 28A-2-9(b)*. The clerk of superior court may issue a stay of an order revoking the letters upon the appellant posting an appropriate bond set by the clerk until the cause is heard and determined upon appeal.

N.C. Gen. Stat. § 28A-9-4 (emphasis supplied). N.C. Gen. Stat. § 28A-2-9(b) (2017) specifically provides: "Appeals in special proceedings shall be as provided in *G.S. 1-301.2*." (emphasis supplied).

N.C. Gen. Stat. § 1-301.2(e) (2017) in turn states, in relevant part:

> (e) Appeal of Clerk's Decisions.-- . . . [A] party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days of entry of the order or judgment, *appeal to the appropriate court for a hearing de novo*. . . . (Emphasis supplied).

Although Petitioner appealed, in the alternative, under N.C. Gen. Stat. § 1-301.3, nothing indicates that section provides an alternative method to appeal decisions or orders of a clerk of court granting or

denying letters testamentary. N.C. Gen. Stat. § 1-301.3 generally governs appeals of trust and estate matters decided by a clerk of court; however, this statute expressly states:

> (a) Applicability. -- This section applies to matters arising in the administration of trusts and of estates of decedents, incompetents, and minors. *G.S. 1-301.2 applies in the conduct of a special proceeding when a special proceeding is required in a matter relating to the administration of an estate.*

N.C. Gen. Stat. § 1-301.3(a) (2017) (emphasis supplied). Under N.C. Gen. Stat. §§ 28A-9-4, 28A-2-9(b) and 1-301.2, an appeal from an order of the clerk of superior court granting or denying a petition to revoke letters testamentary mandates a *de novo* hearing. N.C. Gen. Stat. § 1-301.2(e) provides the appropriate scope of review for Petitioner's appeal of the Revocation Order to the superior court, and not N.C. Gen. Stat. § 1-301.3. *See id.*

Respondent cites this Court's opinion in *In re Estate of Longest*, 74 N.C. App. 386, 328 S.E.2d 804 (1985), to contend the superior court was not required to conduct a *de novo* hearing and that the court applied the correct standard of review. *Longest* involved an appeal of a superior court order affirming a clerk of court's order to revoke letters testamentary. *Longest*, 74 N.C. App. at 388-89, 328 S.E.2d at 806.

This Court stated, in relevant part: "Civil actions and special proceedings, . . . which originate before the Clerk of Court are heard *de novo* when appealed to the Superior Court. However, a proceeding to remove an executor is not a civil action or a special proceeding." *Id.* at 389, 328 S.E.2d at 807 (citation omitted). The Court also stated: "[I]n an appeal from an order of the Clerk in a probate matter, the Superior Court is not required to conduct a *de novo* hearing." *Id.* at 390, 328 S.E.2d at 807.

Longest was decided prior to the General Assembly's amendment of N.C. Gen. Stat. § 28A-9-4 in 2011 to provide for "a hearing *de novo*" in the nature of a special proceeding. The General Assembly enacted N.C. Gen. Stat. § 28A-2-9(b) to make N.C. Gen. Stat. § 1-301.2, which provides for a *de novo* hearing, applicable to appeals of orders granting or denying letters testamentary. Session Laws 2011-344, § 4, eff. Jan. 1, 2012. This Court's opinion in *Longest* no longer controls the standard or scope of review applied to appeals to the superior court of a clerk of court's order granting or denying letters testamentary. *See id.* Respondent's position is contradicted by the plain language and legislative history of the statutes.

The superior court was not required to review the Revocation Order *de novo*, but to conduct "a hearing *de novo*" pursuant to N.C. Gen. Stat. §§ 28A-9-4, 28A-2-9(b), and 1-301.2.

The superior court's order denying Petitioner's petition to revoke Respondent's letters testamentary, states, in relevant part:

> [A]fter review of the court file, evidence presented, petitioner's post hearing brief, applicable law, and arguments of counsel, the Court finds as follows:
>
> 1. That the findings of fact are supported by the evidence;
>
> 2. That the conclusions of law are supported by the findings of facts; and
>
> 3. That the order is consistent with the conclusions of law.

The language of the superior court's order does not indicate it conducted "a hearing *de novo*" as is required by N.C. Gen. Stat. § 1-301.2. Instead, the language of the trial court's order tracks the language of N.C. Gen. Stat. § 1-301.*3(d)*, which states:

> (d) Duty of Judge on Appeal. -- Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:
>
> *(1) Whether the findings of fact are supported by the evidence.*
>
> *(2) Whether the conclusions of law are supported by the findings of facts.*
>
> *(3) Whether the order or judgment is consistent with the conclusions of law and applicable law.* (Emphasis supplied).

The Supreme Court of North Carolina has recognized that "When the order or judgment appealed from was entered under a misapprehension of the applicable law, the judgment, including the findings of fact and conclusions of law on which the judgment was based, will be vacated and the case remanded for further proceedings." *Concerned Citizens v. Holden Enterprises*, 329 N.C. 37, 54-55, 404 S.E.2d 677, 688 (1991) (1991) (citation omitted); *see Thompson v. Town of White Lake*, __ N.C. App. __, __, 797 S.E.2d 346, 353 (2017) ("Ordinarily when a superior court applies the wrong standard of review . . . this Court vacates the superior court judgment and remands for proper application of the correct standard.").

Based upon the superior court's apparent misapprehension of the scope of its review, the appeal of the clerk of court's Revocation Order must be remanded to the superior court for "a hearing *de novo*" in accordance with N.C. Gen. Stat. §§ 28A-9-4, 28A-2-9(b), and 1-301.2.

"The word '*de novo*' means fresh or anew; for a second time; and a *de novo* trial in appellate court is a trial had as if no action whatever had been instituted in the court below." *In re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964) (citation and quotation marks omitted). "A court empowered to hear a case *de novo* is vested with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court." *Caswell Cty. v. Hanks*, 120 N.C. App. 489, 491, 462 S.E.2d 841, 843 (1995) (citations and internal quotation marks omitted).

In *Hanks*, this Court analyzed the provision of N.C. Gen. Stat. § 67-4.1(c) providing for an appeal to superior court of a county's animal control appellate board's determination that a dog is a "potentially dangerous dog." *Id.* at 490, 462 S.E.2d at 842. N.C. Gen. Stat. § 67-4.1(c) states, in relevant part: "The appeal *shall be heard de novo* before a superior court judge sitting in the county in which the appellate Board whose ruling is being appealed is located."

In analyzing N.C. Gen. Stat. § 67-4.1(c), this Court stated: "The language of the statute in this case is mandatory, providing that the appeal to superior court 'shall be heard *de novo*[.]' " *Hanks*, 120 N.C. App. at 491, 462 S.E.2d at 843 (citing N.C. Gen. Stat. § 67-4.1(c)).

This Court held: "The plain language of N.C. Gen. Stat. § 67-4.1(c) . . . requires that the superior court must hear the case on its merits from beginning to end as if no hearing had been held by the Board and without any presumption in favor of the Board's decision." *Id.*

As with N.C. Gen. Stat. § 67-4.1(c), N.C. Gen. Stat. § 1-301.2(e) expressly provides for "a hearing *de novo*" on appeal to the superior court, and not just *de novo* or whole record review. The order appealed from is vacated and remanded. Upon remand, the superior court is required to conduct "a hearing *de novo*" of Petitioner's petition for revocation of letters testamentary, "as if no hearing had been held by the [clerk] and without any presumption in favor of the [clerk's] decision." *Hanks*, 120 N.C. App. at 491, 462 S.E.2d at 843.

B. *The Deficiency Order*

[2] Petitioner also argues the superior court applied the wrong standard of review to Respondent's appeal of the Deficiency Order. We agree.

Unlike petitions for revocation of letters testamentary under N.C. Gen. Stat. § 28A-9-4, no statute expressly addresses appeals of a clerk of court's order awarding or denying a deficiency for a surviving spouse's year's allowance under N.C. Gen. Stat. § 30-15 (2017).

The appeal of a clerk of court's order regarding a deficiency in a year's allowance falls under the general area of "[a]ppeal[s] of trust and estate matters determined by clerk," and is governed by N.C. Gen. Stat. § 1-301.3. This statute provides, in relevant part:

> (a) Applicability. -- This section applies to matters arising in the administration of trusts and of estates of decedents, incompetents, and minors. . . .
>
> (b) Clerk to Decide Estate Matters. -- In matters covered by this section, the clerk shall determine all issues of fact and law. The clerk shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment.
>
> (c) Appeal to Superior Court. -- A party aggrieved by an order or judgment of the clerk may appeal to the superior court by filing a written notice of the appeal with the clerk within 10 days of entry of the order or judgment after service of the order on that party. . . .
>
> (d) Duty of Judge on Appeal. -- Upon appeal, the judge of the superior court shall review the order or judgment of the clerk *for the purpose of determining only the following:*
>
> *(1) Whether the findings of fact are supported by the evidence.*
>
> *(2) Whether the conclusions of law are supported by the findings of facts.*
>
> *(3) Whether the order or judgment is consistent with the conclusions of law and applicable law.*

N.C. Gen. Stat. § 1-301.3(a)-(d) (emphasis supplied).

This Court has stated:

> On appeal to the Superior Court of an order of the Clerk in matters of probate, the trial court judge sits as an appellate court. When the order or judgment appealed from does contain specific findings of fact or conclusions to which an appropriate exception has been taken, the role of the

> trial judge on appeal is to apply the whole record test. In doing so, the trial judge reviews the Clerk's findings and may either affirm, reverse, or modify them. If there is evidence to support the findings of the Clerk, the judge must affirm. Moreover, even though the Clerk may have made an erroneous finding which is not supported by the evidence, the Clerk's order will not be disturbed if the legal conclusions upon which it is based are supported by other proper findings.

Pate, 119 N.C. App. at 402-03, 459 S.E.2d at 2-3 (citations and quotation marks omitted). The superior court's order granting Respondent's appeal and vacating the clerk of court's Deficiency Order states, in relevant part:

> [U]pon the Respondent's appeal of the November 20, 2017 Order of the Honorable Mark Hammonds, Clerk of Superior Court for Anson County, finding a year's allowance deficiency, and after review of the court file, evidence presented, petitioner's post hearing brief, applicable law, and arguments of counsel, the Court finds that the Honorable Mark Hammonds, Clerk of Superior Court for Anson County, entered an Order on January 20, 2016 Assigning Spouse['s] Year's Allowance of $13,349.50, as a credit against the spouse['s] testate share, without any deficiency. The court finds that the January 20, 2016 Order to be the controlling Order, and that the Order entered on November 20, 2017 by Clerk Hammonds finding a year's allowance deficiency of $16,650.50 is null and void and of no effect.

The superior court's order does not indicate the court applied the deferential standard of review as is required by N.C. Gen. Stat. § 1-301.3(d), but instead disregarded the clerk of court's findings of fact and conducted a *de novo* review. The superior court's ruling on Respondent's appeal of the clerk's Deficiency Order must also be vacated and remanded to the superior court for application of the correct standard of review as is required by N.C. Gen. Stat. § 1-301.3(d). *See Concerned Citizens*, 329 N.C. at 54-55, 404 S.E.2d at 688.

VI. Conclusion

The superior court applied the wrong scope of review to the clerk of court's Revocation Order and the wrong standard of review to the clerk's Deficiency Order. We vacate and remand these matters to the

superior court for application of the statutorily mandated scopes of review. Upon remand, the superior court must conduct "a hearing *de novo*" of Petitioner's appeal of the Revocation Order in accordance with N.C. Gen. Stat. §§ 28A-9-4, 28A-2-9(b), and 1-301.2. The superior court must apply the controlling standard of review required by N.C. Gen. Stat. § 1-301.3(d) to Respondent's appeal of the Deficiency Order. *It is so ordered.*

VACATED AND REMANDED.

Judges ZACHARY and COLLINS concur.

IN THE MATTER OF PROPOSED FORECLOSURE OF CLAIM OF LIEN FILED ON CALMORE GEORGE AND HYGIENA JENNIFER GEORGE BY THE CROSSINGS COMMUNITY ASSOCIATION, INC. DATED AUGUST 22, 2016, RECORDED IN DOCKET NO. 16-M-6465 IN THE OFFICE OF THE CLERK OF COURT OF SUPERIOR COURT FOR MECKLENBURG COUNTY REGISTRY BY SELLERS, AYRES, DORTCH & LYONS, P.A.

No. COA18-611

Filed 19 February 2019

1. Parties—joinder—necessary party—trustee

In an action to foreclose a homeowners' association claim of lien for failure to pay association fees, the trial court did not err by failing to join a trustee as a necessary party. The proceeding was not a foreclosure of the deed of trust for which the trustee served, but of the lien held by the association.

2. Process and Service—notice of non-judicial foreclosure—service on record owners—dwelling or usual place of abode

In an action to foreclose a homeowners' association claim of lien for failure to pay association fees, the trial court properly voided the foreclosure sale for lack of personal jurisdiction over one of the owners who had not been properly served with the notice of foreclosure. The owners lived out of state and only returned to the subject property a few times a year; therefore, leaving copies of the notice there was insufficient service since the property was not the owners' dwelling house or usual place of abode.

3. Real Property—foreclosure sale—deficient service—good faith purchasers for value

In an action to foreclose a homeowners' association claim of lien for failure to pay association fees, the trial court's findings of fact did not support its conclusion that the buyer at foreclosure was not a good faith purchaser for value. Although the record owners of the subject property had not been properly served with the notice of foreclosure in accordance with Civil Procedure Rule 4, they received constitutionally sufficient notice, and there was no record evidence that the buyer had actual knowledge or constructive notice of the improper statutory service. Moreover, the low sale price was not, by itself, reason to set aside the foreclosure, and it constituted adequate value.

Judge DILLON concurring by separate opinion.

Judge BRYANT concurring in part and dissenting in part by separate opinion.

Appeal by respondents from orders entered 17 July 2017, 9 August 2017, and 15 March 2018 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 November 2018.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, and DeVore Acton & Stafford, PA, by Derek P. Adler, for respondents-appellants.

Thurman, Wilson, Boutwell & Galvin, P.A., by James P. Galvin, for petitioners-appellees.

ZACHARY, Judge.

KPC Holdings and National Indemnity Group ("National Indemnity" and collectively "Respondents") appeal orders adding them as parties to this action, setting aside an order for foreclosure, canceling a deed, and denying an indicative joint motion for relief under Rule 60(b)(6). After careful review, we conclude that the trial court correctly determined that the foreclosure sale in this case was invalid due to lack of proper service of the notice of foreclosure, and that the trustee on a deed of trust other than that on which foreclosure was instituted was not a necessary party to the proceedings; however, KPC Holdings was a good faith purchaser for value. Therefore, the trial court should not have

voided the deed conveying the property to KPC Holdings or the subsequent deed to National Indemnity.

Background

Calmore George and his wife, Hygiena Jennifer George, owned a home in Mecklenburg County, North Carolina. On 22 August 2016, The Crossings Community Association, Inc., the Georges' homeowners' association, filed a planned community claim of lien against the Georges' property for unpaid association fees totaling $204.75. The homeowners' association appointed a trustee to represent the association on its claim of lien, and the trustee commenced a non-judicial foreclosure proceeding on the property. Included in the documents filed in the foreclosure proceeding were two sheriff's returns of service indicating personal service of the notice of foreclosure upon Hygiena Jennifer George and substitute service upon Calmore George by leaving the notice with his wife at their residence. The foreclosure trustee also filed an affidavit of attempted service of process by certified mail, return receipt requested, and by first class mail sent to both the Mecklenburg County property and to the Georges' other known address in the Virgin Islands.

On 9 December 2016, an Assistant Clerk of Mecklenburg County Superior Court filed an order permitting foreclosure with a notice of sale indicating that the property would be sold at auction on 12 January 2017. KPC Holdings purchased the property on 12 January 2017 for $2,650.22. No party filed an upset bid by the deadline and on 3 February 2017, the foreclosure trustee deeded the land to KPC Holdings. On 21 March 2017, KPC Holdings conveyed the property to National Indemnity in consideration for National Indemnity's promise to pay KPC Holdings $150,000.00, evidenced by a promissory note and deed of trust naming Jonathan Hankin as trustee.

On 18 April 2017, the Georges filed a motion to set aside the foreclosure sale under Rule 60(c) of the North Carolina Rules of Civil Procedure alleging that "[n]o type of personal service was effectuated [upon] the Georges." National Indemnity moved to intervene on 10 May 2017. On 17 July 2017, the Honorable Nathaniel J. Poovey heard the Rule 60 motion and subsequently entered an order joining National Indemnity and KPC Holdings as necessary parties to the proceeding. After a hearing, on 9 August 2017, Judge Poovey entered an order setting aside the order for foreclosure, canceling the trustee's foreclosure deed to KPC Holdings, and canceling KPC Holdings' deed to National Indemnity.

National Indemnity appealed the 9 August 2017 order setting aside the foreclosure on 1 September 2017. That same day, KPC Holdings

appealed both the 17 July 2017 order joining KPC Holdings as a necessary party and the 9 August 2017 order setting aside the foreclosure and canceling the deeds.

Thereafter, Respondents filed a Joint Motion for Relief under Rule 60(b)(6) with the trial court, and requested that this Court temporarily remand the case for the trial court to hear the motion and enter an indicative ruling. This Court granted Respondent's Motion to Remand.[1] On 15 March 2018, the trial court entered an Indicative Denial of Joint Motion for Relief under Rule 60(b)(6). Respondents timely filed notices of appeal from the Indicative Denial.

Discussion

Respondents argue on appeal that the trial court erred in: (1) failing to join the trustee on the deed of trust between KPC Holdings and National Indemnity as a necessary party to the Rule 60 proceeding; (2) ruling that the foreclosure trustee failed to give sufficient notice of the non-judicial foreclosure proceeding to Calmore George; and (3) determining that Respondents were not good faith purchasers for value.[2] We address each argument in turn.

Rule 60(b) Motions

Rule 60 of the North Carolina Rules of Civil Procedure allows the trial court to relieve a party from a final judgment or order for several reasons, including that "[t]he judgment is void" and "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(4), (6) (2017). "A judgment will not be deemed void merely for an error in law, fact, or procedure. A judgment is void only

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1. Generally, the filing of an appeal divests the trial court's jurisdiction over a case; however, "[t]he trial court retains limited jurisdiction to indicate how it is inclined to rule on a Rule 60(b) motion." *Hall v. Cohen*, 177 N.C. App. 456, 458, 628 S.E.2d 469, 471 (2006). When a party notifies this Court that a Rule 60(b) motion has been filed in the trial court, "this Court will remand the matter to the trial court so the trial court may hold an evidentiary hearing and indicate 'how it [is] inclined to rule on the motion were the appeal not pending.' " *Id.* (quoting *Bell v. Martin*, 43 N.C. App. 134, 142, 258 S.E.2d 403, 409 (1979), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980)). If the trial court indicates it would grant the motion, then the party could ask this Court to remand the case for a final judgment on the motion. *Bell*, 43 N.C. App. at 142, 258 S.E.2d at 409. "An indication by the trial court that it would deny the motion would be considered binding on that court and [the] appellant could then request appellate court review of the lower court's action." *Id.*

2. KPC Holdings noticed for appeal the 17 July 2017 order joining it as a necessary party; however, KPC Holdings presents no argument in its brief concerning this alleged error. Thus, this argument is abandoned and we will not review it. N.C.R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered." *Burton v. Blanton*, 107 N.C. App. 615, 616, 421 S.E.2d 381, 382 (1992). A trial court cannot set aside a judgment or order pursuant to Rule 60(b)(6) without showing that: (1) extraordinary circumstances exist, and (2) justice demands relief. *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987). Additionally, to obtain relief under Rule 60(b)(6), the moving party must show that it has a meritorious defense. *In re Oxford Plastics v. Goodson*, 74 N.C. App. 256, 258, 328 S.E.2d 7, 9 (1985).

The determination of whether to grant relief under Rule 60(b)(6) is equitable in nature and within the trial court's discretion. *Kennedy v. Starr*, 62 N.C. App. 182, 186, 302 S.E.2d 497, 499-500, *disc. review denied*, 309 N.C. 321, 307 S.E.2d 164 (1983). As such, this Court reviews Rule 60(b) motions for an abuse of discretion. *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006). "A trial court abuses its discretion when its decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Ehrenhaus v. Baker*, 216 N.C. App. 59, 71, 717 S.E.2d 9, 18 (2011) (quotation marks omitted), *appeal dismissed and disc. review denied*, 366 N.C. 420, 735 S.E.2d 332 (2012).

North Carolina Planned Community Act

The General Assembly enacted the North Carolina Planned Community Act to regulate "the creation, alteration, termination, and management of planned subdivision communities." *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 399, 584 S.E.2d 731, 734, *reh'g denied*, 357 N.C. 582, 588 S.E.2d 891 (2003); *see also generally* "An Act to Establish the North Carolina Planned Community Act," 1998 N.C. Sess. Laws 674, ch. 199 (codified as amended at N.C. Gen. Stat. §§ 47F-1-101 to -3-122). A "planned community" is "real estate with respect to which any person, by virtue of that person's ownership of a lot, is expressly obligated by a declaration to pay real property taxes, insurance premiums, or other expenses to maintain, improve, or benefit other lots or other real estate described in the declaration." N.C. Gen. Stat. § 47F-1-103(23) (2017). A planned community's owners' association is empowered to, among other things, "[i]mpose and receive any payments, fees, or charges for the use, rental, or operation of the common elements . . . and for services provided to lot owners." *Id.* § 47F-3-102(10). Any assessment levied upon a lot owner that is unpaid for thirty days or more constitutes a lien on the property when a claim of lien is filed with the clerk of superior court in the county in which the land is situated. *Id.*

§ 47F-3-116(a). The owners' association "may foreclose a claim of lien in like manner as a mortgage or deed of trust on real estate under power of sale, as provided in Article 2A of Chapter 45 of the General Statutes, if the assessment remains unpaid for 90 days or more." *Id.* § 47F-3-116(f). Thus, a foreclosure of an owners' association claim of lien proceeds as a power of sale foreclosure.

I. Failure to Join a Necessary Party

[1] Respondents argue that the trial court erred by failing to join Jonathan Hankin, the trustee named on the deed of trust between KPC Holdings and National Indemnity, as a necessary party to the Rule 60(b) proceedings. We disagree.

Parties "who are united in interest must be joined as plaintiffs or defendants." *Id.* § 1A-1, Rule 19(a). "A person is 'united in interest' with another party when that person's presence is necessary in order for the court to determine the claim before it without prejudicing the rights of a party before it or the rights of others not before the court." *Ludwig v. Hart*, 40 N.C. App. 188, 190, 252 S.E.2d 270, 272, *disc. review denied*, 297 N.C. 454, 256 S.E.2d 807 (1979). "A 'necessary' party is one whose presence is required for a complete determination of the claim, and is one whose interest is such that no decree can be rendered without affecting the party." *In re Foreclosure of Barbot*, 200 N.C. App. 316, 319, 683 S.E.2d 450, 453 (2009). "A judgment which is determinative of a claim arising in an action to which one who is 'united in interest' with one of the parties has not been joined is void." *Ludwig*, 40 N.C. App. at 190, 252 S.E.2d at 272. When the absence of a necessary party is brought to the attention of the trial court, it should not address the merits of the case until the necessary party is joined to the action, and the trial court should bring in the necessary party *ex mero motu* if no other party moves to do so. *Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978).

Generally, when a party seeks "to have [a] deed declared null and void[,] . . . . the court would have to have jurisdiction over the parties necessary to convey good title." *Brown v. Miller*, 63 N.C. App. 694, 699, 306 S.E.2d 502, 505 (1983), *appeal dismissed and disc. review denied*, 310 N.C. 476, 312 S.E.2d 882 (1984). A trustee is one of three parties involved in a deed of trust,

> [wherein] the borrower conveys legal title to real property to a third party trustee to hold for the benefit of the lender until repayment of the loan . . . . When the loan is repaid, the trustee cancels the deed of trust, restoring legal title

> to the borrower, who at all times retains equitable title in the property.

Skinner v. Preferred Credit, 361 N.C. 114, 120-21, 638 S.E.2d 203, 209 (2006) (citations omitted), *reh'g denied*, 361 N.C. 371, 643 S.E.2d 519 (2007). Accordingly, in foreclosure proceedings, "[t]rustees are necessary parties . . . because the trustee is the party tasked with facilitating the [foreclosure] process." *Greene v. Tr. Servs. of Carolina, LLC*, 244 N.C. App. 583, 596, 781 S.E.2d 664, 673, *disc. review denied*, 368 N.C. 911, 786 S.E.2d 268 (2016).

The trustee on a deed of trust is not, however, inevitably a necessary party to all litigation involving property for which the trustee holds the deed of trust. In 2011, the General Assembly enacted a statute titled, "An Act to Modernize and Enact Certain Provisions Regarding Deeds of Trust . . . Eliminating Trustee of Deed of Trust as Necessary Party for Certain Transactions and Litigation . . . ." 2011 N.C. Sess. Laws 1212, 1231-32, ch. 312, § 15 (codified as amended at N.C. Gen. Stat. § 45-45.3). This Act provides that

> [e]xcept in matters relating to the foreclosure of the deed of trust or the exercise of a power of sale under the terms of the deed of trust, *the trustee is neither a necessary nor a proper party to any civil action or proceeding involving (i) title to the real property encumbered by the lien of the deed of trust* or (ii) the priority of the lien of the deed of trust.

N.C. Gen. Stat. § 45-45.3(c) (2017) (emphasis added). Proceedings in which the trustee on the deed of trust is not a necessary party include "*[t]he foreclosure of a lien other than the lien of the deed of trust*, regardless of whether the lien is superior or subordinate to the lien of the deed of trust, including, but not limited to, the foreclosure of mortgages, other deeds of trust, tax liens, and assessment liens." *Id.* § 45-45.3(c)(6) (emphasis added).

Here, Jonathan Hankin is named as trustee on the deed of trust between KPC Holdings and National Indemnity. The proceedings in this case did not endeavor to foreclose upon the deed of trust for which Hankin is trustee, but rather concerned the foreclosure of the homeowners' association's claim of lien on the property—"a lien other than the lien of the deed of trust." *Id.* Thus, Hankin was not a necessary party to either Rule 60 proceeding. Accordingly, the trial court did not err in declining to join Hankin as a necessary party.

II. Notice of Foreclosure

[2] Respondents next argue that the trial court erred by ruling that the foreclosure trustee failed to give proper notice of the non-judicial foreclosure proceeding to Calmore George. This argument lacks merit.

To foreclose upon a claim of lien, a homeowners' association must do so "in like manner as a mortgage or deed of trust on real estate under power of sale, as provided in Article 2A of Chapter 45 of the General Statutes." N.C. Gen. Stat. § 47F-3-116(f) (2017). Chapter 45 of the General Statutes provides that

> [a]fter the notice of hearing is filed, *the notice of hearing shall be served upon each party entitled to notice under this section*. . . . The notice shall be served and proof of service shall be made in *any manner provided by the Rules of Civil Procedure for service of summons*, including service by registered mail or certified mail, return receipt requested.

Id. § 45-21.16(a) (emphases added). The notice must be provided to "[e]very record owner of the real estate whose interest is of record in the county where the real property is located at the time the notice of hearing is filed in that county." *Id.* § 45-21.16(b)(3). "The purpose and aim of the service of the summons are to give notice to the party against whom the proceeding or action is commenced, and any notification which reasonably accomplishes that purpose answers the claims of law and justice." *Jester v. Steam Packet Co.*, 131 N.C. 54, 55, 42 S.E. 447, 447 (1902). "It is well established that a court may obtain personal jurisdiction over a defendant only by the issuance of summons and service of process by one of the statutorily specified methods." *Glover v. Farmer*, 127 N.C. App. 488, 490, 490 S.E.2d 576, 577 (1997), *disc. review denied*, 347 N.C. 575, 502 S.E.2d 590 (1998). "Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed." *Id.*

Rule 4 of our Rules of Civil Procedure provides the acceptable methods of service of process required in order to properly exercise personal jurisdiction upon a natural person in this State. N.C. Gen. Stat. § 1A-1, Rule 4(j)(1) (2017). Relevant to this case, a party may accomplish service upon a natural person not under disability in one of the following ways:

> a. By delivering a copy of the summons and of the complaint to the natural person or by leaving copies thereof at the defendant's dwelling house or usual place of abode

> with some person of suitable age and discretion then residing therein.
>
> . . . .
>
> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

Id. § 1A-1, Rule 4(j)(1)(a), (c).

Service by personal delivery is accomplished by either: (1) delivering the complaint and summons to "the natural person" named therein, or (2) leaving a copy of those documents "at the defendant's dwelling house or usual place of abode" with someone "of suitable age and discretion" who resides at the residence. *Id.* § 1A-1, Rule 4(j)(1)(a). "[N]o hard-and-fast definition can be laid down" for what constitutes an individual's dwelling house or usual place of abode, but it "is a question to be determined on the facts of the particular case." *Van Buren v. Glasco*, 27 N.C. App. 1, 5, 217 S.E.2d 579, 582 (1975), *overruled on other grounds by Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982). "[I]t is unrealistic to interpret Rule 4[ ] so that the person to be served only has one dwelling house or usual place of abode at which process may be left." *Id.* at 6, 217 S.E.2d at 582.

When attempting to effectuate service by certified mail, return receipt requested, "the serving party shall file an affidavit with the court showing proof of such service in accordance with the requirements of G.S. 1-75.10(a)(4)." N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) (2017). The affidavit must aver:

> a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
>
> b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
>
> c. That the genuine receipt or other evidence of delivery is attached.

Id. § 1-75.10(a)(4). The requirement that an affidavit contain information showing the circumstances warranting the use of service by registered mail under Rule 4(j2)(2) in order to constitute proof of service is mandatory. *See Dawkins v. Dawkins*, 32 N.C. App. 497, 499, 232 S.E.2d 456,

457 (1977) (applying a former version of Rule 4). "[F]ailure to serve process in the manner prescribed by statute makes the service invalid, even though a defendant has actual notice of the lawsuit." *Hunter v. Hunter*, 69 N.C. App. 659, 662, 317 S.E.2d 910, 911 (1984).

Here, while the Georges owned the Mecklenburg County property at issue, they did not reside there; they lived in the Virgin Islands. The Georges' three daughters lived at the Mecklenburg County residence in order to attend college. Hygiena Jennifer George testified that she visited the Mecklenburg County property when she was on vacation. Calmore George testified that he usually visited the Mecklenburg County property once per year around the Christmas holiday or once every few years if there was a significant maintenance issue that required his presence. Whenever the Georges did visit the Mecklenburg County property, they "stay[ed] in the study area with [an] inflatable bed."

Deputy Shakita Barnes of the Mecklenburg County Sheriff's Office attempted personal service of the notice of foreclosure upon the Georges. According to the Foreclosure Notice of Return, Deputy Barnes personally served Hygiena Jennifer George and served Calmore George by leaving copies of the notice with his wife Jennifer, "who is a person of suitable age and discretion and who resides in the respondent's dwelling house or usual place of abode." However, Deputy Barnes *actually* served one of the Georges' daughters, Janine, a younger female who "said that she was . . . Ms. Jennifer George."

In voiding the foreclosure sale of the property, the trial court found that the property was "not the dwelling or usual place of abode for Calmore George" and that "proper service upon Calmore George did not occur and the court did not have personal jurisdiction to enter an order adverse to him." The trial court further determined "that no findings are necessary regarding the determination of whether [the Mecklenburg County property] is the dwelling or usual place of abode for [Hygiena] Jennifer George." As a result, the trial court set aside the foreclosure of the Georges' property, canceled the foreclosure deed to KPC Holdings, and canceled the subsequent conveyance of the property from KPC Holdings to National Indemnity.

The trial court correctly determined that the foreclosure trustee failed to serve all record owners of the property as required by N.C. Gen. Stat. § 45-21.16. The attempted service of the notice of foreclosure upon Calmore George by leaving a copy at the Mecklenburg County property was inadequate because the property was not his dwelling house or usual place of abode.

A place of residence to which the owners only return once or twice each year over the holidays or for maintenance issues does not qualify as a dwelling house or usual place of abode for purposes of Rule 4 service. In *Van Buren*, service was accomplished by delivering copies of the summons to the appellant's fifteen-year-old son. 27 N.C. App. at 5, 217 S.E.2d at 582. The appellant owned the home with his wife as tenants by the entirety, and his wife and children resided there. *Id.* Although the appellant spent most of his time working in South Carolina, he "regularly returned [to the home] on a frequently recurring basis." *Id.* The appellant stated in an affidavit that he would normally be present at the home "at least twice during any 30-day period." *Id.* This Court held that the appellant's "relationship and connection with the North Carolina dwelling were such that there was a reasonable probability that substitute service of process at that dwelling would, as it in fact here did, inform him of the proceedings against him." *Id.* at 6, 217 S.E.2d at 582.

By contrast, in this case, the Georges were present at the property far less than "twice during any 30-day period." *Id.* at 5, 217 S.E.2d at 582. The evidence presented to the trial court demonstrated that, at most, the Georges were present on the property a few times each year, mostly around the holiday season, as well as when maintenance issues arose requiring Calmore George's attention. Such an infrequent and temporary presence is not enough to qualify the residence as the dwelling house or place of abode for Calmore George, rendering the attempted substitute service improper. Accordingly, the trial court correctly determined that the foreclosure sale was void due to lack of personal jurisdiction over Calmore George.

III. Purchaser in Good Faith

[3] Respondents next argue that the trial court erred in determining that neither KPC Holdings nor National Indemnity were good faith purchasers for value, and by thereafter voiding KPC Holdings' title to the property as well as its subsequent deed to National Indemnity. We agree.

Our General Statutes provide that title to property sold under a judgment to a good faith purchaser for value cannot be set aside:

> If a judgment is set aside pursuant to Rule 60(b) or (c) of the Rules of Civil Procedure and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected.

N.C. Gen. Stat. § 1-108 (2017). "A person is an innocent purchaser when he purchases without notice, actual or constructive, of any infirmity, and pays valuable consideration and acts in good faith." *Morehead v. Harris*, 262 N.C. 330, 338, 137 S.E.2d 174, 182 (1964). A buyer purchases without notice of defects when "(a) he has no actual knowledge of the defects; (b) he is not on reasonable notice from recorded instruments; and (c) the defects are not such that a person attending the sale exercising reasonable care would have been aware of the defect." *Swindell v. Overton*, 310 N.C. 707, 714-15, 314 S.E.2d 512, 517 (1984).

Absent actual notice of any defect, a purchaser may rely on the record's facial validity in determining that title to the land in question is devoid of defects. *See Goodson v. Goodson*, 145 N.C. App. 356, 363, 551 S.E.2d 200, 206 (2001) ("[T]he deficiencies in the conveyance must be expressly or by reference set out in the muniments of record title, or brought to the notice of the purchaser so as to put him on inquiry." (citing *Morehead*, 262 N.C. at 340-41, 137 S.E.2d at 184)). There is a presumption of effective service "[w]hen the return shows legal service by an authorized officer, nothing else appearing." *Harrington v. Rice*, 245 N.C. 640, 642, 97 S.E.2d 239, 241 (1957). "Allegations of inadequacy of the purchase price realized at a foreclosure sale which has in all other respects been duly and properly conducted in strict conformity with the power of sale will not be sufficient to upset a sale." *Swindell*, 310 N.C. at 713, 314 S.E.2d at 516.

An individual purchases something when they acquire an "interest in real or personal property by sale, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift, or any other voluntary transaction." *Purchase*, *Black's Law Dictionary* (10th ed. 2014). Consideration is "[s]omething such as an act, a forbearance, or a return promise bargained for and received by a promisor from a promisee." *Consideration*, *Black's Law Dictionary* (10th ed. 2014) (parentheses omitted). "What constitutes valuable consideration depends upon the context of a particular case." *Estate of Graham v. Morrison*, 168 N.C. App. 63, 68, 607 S.E.2d 295, 299 (2005). A deed of trust is a conveyance for valuable consideration. *Edwards v. Bank*, 39 N.C. App. 261, 271, 250 S.E.2d 651, 659 (1979). A purchaser acts in good faith when possessing "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." *Good Faith*, *Black's Law Dictionary* (10th ed. 2014).

A bedrock principle of both our federal and state constitutions is that a person's property cannot be taken without due process of law. U.S. Const. amends. V, XIV; N.C. Const. art. I, § 19. "The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 503 (1985)). N.C. Gen. Stat. § 1-108, which provides that title to property sold under a judgment to a good faith purchaser for value cannot be set aside, "may be unconstitutional *as applied* if the property owner being divested of her property has not received notice which is at least *constitutionally* sufficient." *In re Ackah*, ___ N.C. App. ___, ___, 804 S.E.2d 794, 797 (2017), *aff'd per curiam*, 370 N.C. 594, 811 S.E.2d 143 (2018). Notice is "constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent." *Id.* at ___, 804 S.E.2d at 797 (quoting *Jones v. Flowers*, 547 U.S. 220, 226, 164 L. Ed. 2d 415, 426 (2006)). This Court in *Ackah*, citing *Jones*, stated that "constitutional due process does not require that the property owner receive *actual* notice," *id.* at ___, 804 S.E.2d at 797 (quotation marks omitted), and "where notice sent by certified mail is returned 'unclaimed,' due process requires only that the sender must take *some* reasonable follow-up measure to provide other notice where it is practicable to do so." *Id.* at ___, 804 S.E.2d at 797.

In the instant case, the trial court concluded in its Indicative Denial of Joint Motion for Relief Under Rule 60(b)(6) that "[n]either KPC Holdings nor National Indemnity Group qualifies under N.C. Gen. Stat. § 1-108 as a purchaser in good faith." The trial court found that "[t]he respective principals of [Respondents] are colleagues that have known each other for several years and have had transactions in the past." The trial court also made findings regarding, *inter alia*, KPC Holdings' $2,650.22 purchase of the property at the non-judicial foreclosure sale; the $150,000.00 promissory note, secured by a deed of trust, between KPC Holdings and National Indemnity; and National Indemnity's intention to refurbish and eventually sell the property for $240,000.00. At the hearing to set aside the foreclosure, the trial court stated that the credibility of Laura Schoening, principal of National Indemnity, was negatively affected by her inability to remember the details concerning the deed of trust or whether Respondents had done business in the past.

Nonetheless, KPC Holdings was a good faith purchaser for value at the foreclosure sale. No record evidence exists that either KPC Holdings or National Indemnity had actual knowledge or constructive notice of the improper service of the foreclosure notice. No infirmities

or irregularities existed in the foreclosure record that would reasonably put KPC Holdings or any other prospective purchaser on notice that service was improper. The sheriff's return of service indicated that personal service was made upon Hygiena Jennifer George and that substitute service was accomplished for Calmore George by leaving copies with Hygiena Jennifer George. KPC Holdings was entitled to rely upon that record in purchasing the property at the foreclosure sale. Further, as our Supreme Court has held, the low price of the foreclosure sale alone, absent actual or constructive notice of any infirmities, is not sufficient grounds to set aside a purchase by an otherwise good faith purchaser. *Swindell*, 310 N.C. at 713, 314 S.E.2d at 516. It is also clear that KPC Holdings paid value for the property. Accordingly, the trial court's findings of fact do not support the conclusion that KPC Holdings was not a good faith purchaser. In that KPC Holdings was a good faith purchaser for value, we need not consider whether National Indemnity was as well.

Our dissenting colleague on this issue contends that Respondents are not good faith purchasers within the meaning of N.C. Gen. Stat. § 1-108. Our colleague argues that the inadequate sale price at the foreclosure coupled with the failure to obtain proper service upon the Georges prevents Respondents from retaining title to the land as good faith purchasers. *Dissent* at 2 ("[G]ross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties." (quoting *Foust v. Gate City Sav. & Loan Ass'n*, 233 N.C. 35, 37, 62 S.E.2d 521, 523 (1950))). However, *Swindell* instructs that

> *Foust* stands for the proposition that it is the *materiality* of the irregularity in such a sale, not mere inadequacy of the purchase price, which is determinative of a decision in equity to set the sale aside. Where an irregularity is first alleged, gross inadequacy of purchase price may then be considered on the question of the materiality of the irregularity.

Swindell, 310 N.C. at 713, 314 S.E.2d at 516 (emphasis added). We think the failure to effectuate service is not a material irregularity where, as here, the Georges have experienced at least two previous foreclosures on this same Mecklenburg County property, and are familiar with the procedure. Accordingly, we do not agree with our dissenting colleague that the equities weigh in the Georges' favor.

While Calmore George did not receive proper Rule 4 notice of the foreclosure sale of the property, as explained above, the Georges did receive constitutionally sufficient notice. Thus, pursuant to N.C. Gen. Stat. § 1-108, the deed to the property sold under the foreclosure judgment to KPC Holdings, a purchaser in good faith, should not have been canceled by the trial court. After a manner of service fails, some follow-up measure reasonably calculated to reach the intended recipient suffices as constitutionally sufficient service. *Ackah*, ___ N.C. App. at ___, 804 S.E.2d at 797. In *Ackah*, the homeowners' association attempted service by certified mail, but the notice letter came back unclaimed. *Id.* at ___, 804 S.E.2d at 796. The homeowners' association then posted notice of the hearing on the front door of the property. *Id.* at ___, 804 S.E.2d at 796. This Court held that the further measure of posting notice on the front door was constitutionally sufficient. *Id.* at ___, 804 S.E.2d at 797. We noted that the homeowners' association did even more than post notice—they also sent several letters by regular mail. *Id.* at ___, 804 S.E.2d at 797.

Here, the trustee for the homeowners' association attempted to inform the Georges of the foreclosure sale by: (1) attempted personal service on Hygiena Jennifer George; (2) attempted personal service on Calmore George; (3) attempted certified mail to the Georges at the Mecklenburg County property address; (4) attempted certified mail to the Georges at the Virgin Islands address; (5) regular mail to the Georges at the Mecklenburg County property address; (6) regular mail to the Georges at the Virgin Islands address; and (7) an email exchange between "Jennifer George" and the foreclosure trustee on 17 January 2017, before the upset-bid period expired, in which Jennifer George requested the reinstatement quote.[3] These attempts are more than enough to establish constitutionally sufficient notice under *Ackah* and *Jones*.

Accordingly, because KPC Holdings was a good faith purchaser for value and because the Georges received constitutionally sufficient notice of the foreclosure sale, the trial court abused its discretion in voiding the order of foreclosure and in canceling both the deed to KPC Holdings and its subsequent deed to National Indemnity. While a harsh result for the Georges, they are not without a remedy. N.C. Gen. Stat. § 1-108 permits the Georges to seek restitution. *Id.* at ___, 804 S.E.2d at 797.

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3. It is unclear whether this "Jennifer George" was Hygiena Jennifer George or one of the Georges' daughters.

In any event, our General Assembly has made the policy decision to favor the good faith purchaser at a foreclosure over the debtor where there is a deficiency in the procedure. As this Court has explained,

> it is our duty to follow the policy decision made by our General Assembly, as set forth in N.C. Gen. Stat. § 1-108, which would favor the interests of [KPC Holdings], as a good faith purchaser at a judicial sale, ahead of the interests of [the Georges] in the Property. We note that the General Assembly's policy decision favoring [KPC Holdings] is rational because it encourages higher bids at judicial sales . . . .

Id. at ___, 804 S.E.2d at 798. "This Court is an error-correcting body, not a policy-making or law-making one. We lack the authority to change the law on the ground that it might make good policy sense to do so." *Fagundes v. Ammons Dev. Grp.*, ___ N.C. App. ___, ___, 796 S.E.2d 529, 533 (citation and quotation marks omitted), *disc. review denied*, 370 N.C. 66, 803 S.E.2d 626 (2017).

In addition to encouraging higher bids at foreclosure sales, our Supreme Court has long recognized that this policy fosters reliance on the integrity of record title to property and judicial proceedings concerning property. *See*, *e.g.*, *Sutton v. Schonwald*, 86 N.C. 198, 202-04 (1882); *see also Bolton v. Harrison*, 250 N.C. 290, 298, 108 S.E.2d 666, 671 (1959) ("Necessarily, purchasers of property, especially land, must have faith in and place reliance on the validity of judicial proceedings.").

Conclusion

KPC Holdings abandoned its appeal of the 17 July 2017 order joining it as a necessary party; thus, that appeal is dismissed. Jonathan Hankin, trustee on the deed of trust between KPC Holdings and National Indemnity, was not a necessary party to either Rule 60 proceeding. The trial court correctly determined that Calmore George was not properly served with notice of the foreclosure sale and that the clerk of court therefore lacked personal jurisdiction to enter a foreclosure against him. However, KPC Holdings was a good faith purchaser for value, and the Georges received constitutionally sufficient notice of the foreclosure sale.

Accordingly, we affirm the portion of the 9 August 2017 order voiding the foreclosure. The portion of that order canceling and setting aside the trustee's foreclosure deed to KPC Holdings, canceling and setting aside the deed between KPC Holdings and National Indemnity,

and canceling and voiding the deed of trust between KPC Holdings and National Indemnity is reversed and remanded. On remand, the trial court may enter an order not inconsistent with this opinion, which may include, for example, relief to the Georges in the form of restitution, as authorized by N.C. Gen. Stat. § 1-108. *Ackah*, ___ N.C. App. at ___, 804 S.E.2d at 800.

DISMISSED IN PART; AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judge DILLON concurs by separate opinion.

Judge BRYANT concurs in part and dissents in part by separate opinion.

DILLON, Judge, concurring.

The facts of this case produce a harsh result. The Georges have lost much wealth due to the low purchase price paid at the foreclosure sale of their property. However, we are compelled to follow the law. And the law does not require that the party who purchased their property at the foreclosure sale to have paid a "valuable consideration," as that term is understood in cases cited by the dissent, to be entitled to protection.

Our General Assembly protects the title of anyone who purchases property at a judicial sale so long as the purchaser is "a purchaser in good faith[.]" N.C. Gen. Stat. § 1-108 (2017). There is nothing in Section 1-108 which requires that the consideration that was paid be substantial, unlike in other contexts. Indeed, the language in Section 1-108 is a little different than other statutes which provide protection to purchasers of real estate. For instance, under the Connor Act, any "purchaser[] *for a valuable consideration"* who records first is protected against any prior, unrecorded conveyance. N.C. Gen. Stat. § 47-18 (2017) (emphasis added). Accordingly, under the Connor Act, a purchaser is not protected unless (s)he has paid a "valuable consideration." *Id.* Our Supreme Court has held that a purchaser must have paid "substantial consideration" in order to fall within the protections of the Connor Act. *See*, *e.g.*, *King v. McRackan*, 168 N.C. 621, 624, 84 S.E. 1027, 1029 (1915) ("The party assuming to be a purchaser for valuable consideration must prove a fair consideration, not up to the full price, but a price paid which would not cause surprise or make any one exclaim, 'He got the land for nothing! There must have been some fraud or contrivance about it.' ").

But Section 1-108 does not require that the purchaser at a judicial sale have paid "a valuable consideration" in order to be protected, so long as purchaser believed in good faith that the sale was properly conducted. Indeed, as long as the purchaser at a judicial sale believed in good faith that the sale was proper, the "inadequacy of the purchase price realized [from the sale] . . . will not be sufficient to upset a sale." *Swindell v. Overton*, 310 N.C. 707, 713, 314 S.E.2d 512, 516 (1984). Therefore, any cases cited by the dissent which concern the application of the Connor Act or similar laws are not relevant here.

In the present case, KPC Holdings purchased the Georges' property at the foreclosure sale. Though the consideration it paid would probably not be adequate enough to qualify them for protection under the Connor Act against a prior, unrecorded conveyance, the amount it paid is not relevant to determine whether it is entitled to protection under Section 1-108. There is nothing in the record to indicate that KPC Holdings was not a purchaser in good faith. There is nothing in the record to indicate that the sale was not duly advertised, etc., or that KPC Holdings thwarted the ability of anyone else from bidding at the judicial sale. KPC Holdings was simply the high bidder. KPC Holdings then sold the property to the current owner, National Indemnity, who seeks protection based on its title from KPC Holdings. There is some allegation that KPC Holdings and National Indemnity may have been self-dealing. However, the nature of the relationship between KPC Holdings and National Indemnity or the consideration paid by National Indemnity to KPC Holdings is irrelevant in this case. The only relevant issue is whether KPC Holdings was a good faith purchaser and, therefore, possessed good title. If it was and it did, then the nature of KPC Holdings' relationship with National Indemnity is irrelevant.

This result is, indeed, a harsh one. "Be that as it may, we must remember that hard cases are the quicksands of the law and [we must] confine ourselves to our appointed task of declaring the legal rights of the parties." *Fulghum v. Selma*, 238 N.C. 100, 103, 76 S.E.2d 368, 370 (1953). I, therefore, concur in the majority opinion.

BRYANT, Judge, concurring in part, dissenting in part.

While I agree with the majority's holding that the trustee with legal title was not a necessary party and the Georges were not properly served with notice of the foreclosure sale, I disagree with the majority's holding that Respondents KPC Holdings and National Indemnity qualify as purchasers in good faith within the meaning of N.C. Gen. Stat. § 1-108. Section 1-108 allows restitution as a remedy, as opposed to setting aside

a deed, only if a purchaser satisfies the burden of proving good faith purchaser status. The premise behind the good faith purchaser doctrine is to protect "an *innocent* purchaser when he purchases without notice, actual or constructive, of any infirmity, and pays valuable consideration and acts in good faith." *Morehead v. Harris*, 262 N.C. 330, 338, 137 S.E.2d. 174, 182 (1964) (emphasis added). "As to this, the true rule is that a bona fide purchaser for value without notice of outstanding equities takes title absolute" and, therefore, is subject to the greatest protection against adverse claims of title. *Perkins v. Langdon*, 237 N.C. 159, 165, 74 S.E.2d 634, 640 (1953). Courts must carefully examine conveyances when applying good faith purchaser status to a purchaser of title. Because I do not believe the record establishes Respondents as innocent purchasers acting in good faith, I do not believe Respondents are entitled to the protections of a purchaser in good faith. Accordingly, I respectfully dissent.

The uncontroverted evidence before the trial court reflected that, at the time of the foreclosure sale, KPC Holdings was made aware of the property value at approximately $150,000, no pending mortgage, and the outstanding debt of $204.75 in homeowners' dues. As the majority details, KPC Holdings purchased the property for $2,650.22, an amount that is grossly disproportionate to the value of the property. Such actions call into question "notice" and "acting in good faith" which are necessary to justify the applicability of a purchaser in good faith under N.C.G.S. § 1-108.

The protection accorded to a purchaser in good faith will not be given to a purchaser for a grossly inadequate consideration. He must have paid a fair consideration, though not necessarily the full value. *See Worthy v. Caddell*, 76 N.C. 82, __ S.E.2d __ (1877). Our Supreme Court has recognized that "when the purchase price is so grossly inadequate [it is] to be prima facie evidence of fraud." *Thompson v. Watkins*, 285 N.C. 616, 626, 207 S.E.2d 740, 747 (1974). In *Foust v. Gate City Sav. & Loan Ass'n*, where the North Carolina Supreme Court addressed a property valued around $5,500 but was actually sold for $825 at a foreclosure sale, the Court stated that "gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties." *Foust v. Gate City Sav. & Loan Ass'n*, 233 N.C. 35, 37, 62 S.E.2d 521, 523 (1950). The inequitable element in this case is the foreclosure trustee's failure to effectuate service for all record owners of the property—the Georges—as required by N.C. Gen. Stat. § 45-21.16. This inequity is material based on

the circumstances, and as such, in the interest of justice, this Court must look at the adequacy of the consideration. Moreover, the burden rests on Respondents to further establish that they are purchasers in good faith, which I believe was not done.

KPC Holdings took the property with notice—actual and constructive—of the estimated value of the property and outstanding debt: both appeared on the face of the record. While KPC Holdings may not have possessed actual knowledge of the defective service to the Georges, there was a public record of the HOA's Claim of Lien and KPC Holdings was on reasonable notice that there were no other liens when it placed a bid of $2,650.22 notwithstanding the property value.[1] This conveyance refutes the legitimacy of the sale where it creates a strong inference of an inequitable element and a reasonable person would find the purchase price appears shockingly unfair. Also, it challenges the notion that Respondents acted in good faith when there was questionable evidence of wrongdoing—Respondents were colleagues, dealt with each other in the past, and both made a substantial profit with their respective conveyances of the property. *Worthy*, 76 N.C. at 86, __ S.E.2d at __ ("[T]he party assuming to be a purchaser for valuable consideration, must prove a fair consideration, not up to the full value, but a price paid which would not cause surprise, or make any one exclaim, 'he got the land for nothing, there must have been some fraud or contrivance about it.' ").

As I believe KPC Holdings is unable to establish good faith purchaser status, National Indemnity, as the subsequent purchaser, cannot attain such status from KPC Holdings: KPC Holdings cannot convey what it does not have.

Given the insufficiency of notice of the foreclosure sale combined with the gross inadequacy of the ultimate sales price, I would affirm the trial court's ruling that Respondents were not purchasers in good faith and thus it was proper to void the sale and cancel the deed.

1. The Georges owned the property free and clear of any mortgage or other liens.

IN RE J.P.S.

[264 N.C. App. 58 (2019)]

IN THE MATTER OF J.P.S.

No. COA18-708

Filed 19 February 2019

1. Appeal and Error—mootness—expired involuntary commitment order—collateral legal consequences

The appeal of an expired involuntary commitment order was not moot because the judgment could have collateral legal consequences such as impeachment, character attacks, or future commitment.

2. Mental Illness—involuntary commitment—dangerous to oneself—future danger required

The trial court's findings were not sufficient to justify the involuntary commitment of respondent based on a danger to himself where the findings reflected respondent's mental illness but did not indicate that his symptoms would persist and endanger him in the near future.

3. Mental Illness—involuntary commitment—danger to others—future danger required

The trial court's findings were not sufficient to justify the involuntary commitment of respondent on the grounds of being a danger to others where there was no explicit finding that there was a reasonable probability of future harm to others.

Appeal by respondent from order entered 15 September 2017 by Judge Tyyawdi M. Hands in Mecklenburg County District Court. Heard in the Court of Appeals 17 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General John Tillery, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for respondent-appellant.

ZACHARY, Judge.

J.P.S.[1] ("Respondent") appeals from an Involuntary Commitment Order entered against him. Respondent argues that the trial court made

1. Given the sensitive nature of this appeal, initials are used to protect Respondent's identity.

insufficient findings of fact to support its conclusion that Respondent was dangerous to himself and others. We agree. As a result, the order is vacated and remanded to the trial court for additional findings of fact.

I. Background

After examining Respondent on 6 September 2017, Dr. Kelly Hobgood of Carolinas Medical Center-Randolph ("CMC-Randolph") in Charlotte executed an Affidavit and Petition for Involuntary Commitment alleging that Respondent was "a substance abuser" who was "mentally ill and dangerous to self or others." The magistrate ordered that Respondent be taken into custody on 7 September 2017. Later that day, Dr. W. Carlton Gay of the Behavioral Health Center at CMC-Randolph examined Respondent and completed an "Examination and Recommendation to Determine Necessity for Involuntary Commitment" form. On the form, Dr. Gay marked boxes indicating that Respondent was "mentally ill," "dangerous to self," "dangerous to others," and "a substance abuser." To support his conclusions, Dr. Gay included in the "Description of Findings" that Respondent

> [m]aintains that he has 5 military staff members stationed around the area giving his [sic] intelligence information to help in his lawsuit against York County Court system/jail. Has made threatening statements toward the judicial staff there in general for the way that he was treated (threat made while here). Feels the Constitution provides him justification. Prior to coming to ED, he took a large # of Valium and Ativan in a suicide attempt.

A commitment hearing was held on 15 September 2017 before the Honorable Tyyawdi M. Hands. After hearing testimony, Judge Hands stated that "[b]ased on the evidence, the Court concludes that Respondent is mentally ill and is . . . dangerous to either himself and/or others. For those reasons, I enter the order that he be committed for up to 30 additional days here and for a 90-day outpatient order." In the trial court's written Involuntary Commitment Order, the trial court marked boxes indicating that Respondent was mentally ill and dangerous to himself or others. To support those conclusions, the trial court marked another box that stated: "Based on the evidence presented, the Court . . . by clear, cogent, and convincing evidence, finds as facts all matters set out in [Dr. Gay's 7 September 2017 report], and the report is incorporated by reference as findings." In addition, the trial court found the following additional facts in support of involuntary commitment:

> Resp[ondent] followed by [outpatient psychiatrist] where he has high dose of Adderall [and] Valium meds. Brought by mom—agitated [and] required multiple forced meds [and] restraints. Sent texts that he was going to start a war [and] had 400 rounds. Has grandiose thoughts. He says he is a commander [and] if judge makes wrong decision in his court case he will extract the judge [and] have his own hearing [and] same [at] Rock Hill PD. Refuses to consider reasonable meds for mania [and] psychosis. Remains on forced meds [and] is calmer today because [of] multiple doses. Resp[ondent] admits he has PTSD from Iraq and retired early. Resp[ondent] is unhappy about the side effects of the medication including feeling very groggy. Resp[ondent] denies mak[ing] the comments about the rounds.

The trial court ordered a thirty-day inpatient commitment for Respondent, followed by a ninety-day period of outpatient commitment. Respondent timely appealed.

II. Discussion

Respondent argues on appeal that the trial court erred in concluding that he was a danger to himself or others, without making sufficient findings of fact to support that conclusion. For the reasons explained below, we agree.

[1] Although Respondent's Commitment Order has already expired, we note that the argument before us is not moot because "the challenged judgment may cause collateral legal consequences for the appellant." *In re Booker*, 193 N.C. App. 433, 436, 667 S.E.2d 302, 304 (2008). Such collateral legal consequences might include use of the judgment to attack the capacity of a trial witness, for impeachment purposes, to attack the character of a defendant if he has put character in issue, or to form the basis for a future commitment. *In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 635 (1977).

When deciding whether to involuntarily commit an individual for inpatient treatment, the trial court must make two specific findings "by clear, cogent, and convincing evidence." N.C. Gen. Stat. § 122C-268(j) (2017). First, the trial court must find "that the respondent is mentally ill." *Id.* Second, the trial court must find that the respondent is "dangerous to self, . . . or dangerous to others." *Id.* In its order, the trial court "shall record the facts that support its findings." *Id.*

Upon review of a commitment order, this Court must "determine whether there was *any* competent evidence to support the 'facts' recorded in the commitment order and whether the trial court's ultimate findings of mental illness and dangerous to self or others were supported by the 'facts' recorded in the order." *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980). However, "[i]t is for the trier of fact to determine whether the competent evidence offered in a particular case met the burden of proof[,]" that is, "whether the evidence of respondent's mental illness and dangerousness was clear, cogent and convincing." *Id.*

In the case before us, Respondent specifically challenges the trial court's conclusions that Respondent was dangerous to himself and dangerous to others. We address each in turn.

A. Dangerous to Self

[2] The General Assembly has defined what it means for an individual to be "dangerous to himself":

> a. "Dangerous to himself" means that within the relevant past:
>
> 1. The individual has acted in such a way as to show:
>
> I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and
>
> II. That there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself; or
>
> 2. The individual has attempted suicide or threatened suicide and that there is a reasonable probability of

> suicide unless adequate treatment is given pursuant to this Chapter; or
>
> 3. The individual has mutilated himself or attempted to mutilate himself and that there is a reasonable probability of serious self-mutilation unless adequate treatment is given pursuant to this Chapter.
>
> Previous episodes of dangerousness to self, when applicable, may be considered when determining reasonable probability of physical debilitation, suicide, or self-mutilation.

N.C. Gen. Stat. § 122C-3(11)(a). The trial court must find sufficient evidence to support one of the three prongs of this statute in order to conclude that an individual is a danger to himself. *Id.*

A trial court's involuntary commitment of a person cannot be based solely on findings of the individual's "history of mental illness or . . . behavior prior to and leading up to the commitment hearing," but must include findings of "a reasonable probability" of some future harm absent treatment as required by N.C. Gen. Stat. § 122C-3(11)(a). *In re Whatley*, 224 N.C. App. 267, 273, 736 S.E.2d 527, 531 (2012). Any commitment order that fails to include such findings is "insufficient to support its conclusions that [the] [r]espondent presented a danger to [himself] and others." *Id.* at 274, 736 S.E.2d at 532.

In *Whatley*, the trial court determined that the respondent was a danger to herself. *Id.* at 270, 736 S.E.2d at 529. To support that conclusion, the trial court incorporated the findings from a physician's report and also made its own findings regarding the respondent's mental illness at the time and the events leading up to her commitment hearing. *See id.* at 271-72, 736 S.E.2d at 530. On appeal, however, this Court determined that "the second prong of the 'dangerous to self' inquiry [was] not satisfied [because] none of the [trial] court's findings demonstrate[d] that there was a reasonable probability of [the] [r]espondent suffering serious physical debilitation within the near future absent her commitment." *Id.* at 272-73, 736 S.E.2d at 531 (quotation marks and brackets omitted). While the findings "reflect[ed] [the] [r]espondent's mental illness, . . . they d[id] not indicate that [the] [r]espondent's illness or any of her aforementioned symptoms [would] persist and endanger her within the near future." *Id.* at 273, 736 S.E.2d at 531. As a result, this Court could not "uphold the trial court's commitment order on the basis that [the] [r]espondent was dangerous to herself." *Id.*

Here, the following evidence was presented at the commitment hearing to support that Respondent was dangerous to himself: (1) Respondent maintained grandiose thoughts that he had a military staff providing him with intelligence information; (2) Respondent ingested a large number of pills in an apparent suicide attempt; (3) Respondent had "a high dose of Adderall [and] Valium meds"; (4) Respondent presented with an agitated manner and required forced medication and restraints; (5) Respondent refused medication for mania and psychosis; and (6) Respondent suffered from post-traumatic stress disorder as a result of prior military service. However, the trial court failed to make any finding that there was "a reasonable probability of [Respondent] suffering serious physical debilitation within the near future unless adequate treatment is given" or that there was "a reasonable probability of suicide unless adequate treatment is given." N.C. Gen. Stat. § 122C-3(11)(a)(1), (2). As in *Whatley*, the trial court's findings in this case "reflect Respondent's mental illness, but they do not indicate that Respondent's illness or any of [his] aforementioned symptoms will persist and endanger [him] within the near future." *Whatley*, 224 N.C. App. at 273, 736 S.E.2d at 531. Although the trial court need not say the magic words "reasonable probability of future harm," it must draw a nexus between past conduct and future danger. *Id.*

Accordingly, because of the trial court's failure to include a finding of a reasonable probability of some future harm, "we cannot uphold the trial court's commitment order on the basis that Respondent posed a danger to [himself]." *Id.*

B. Dangerous to Others

[3] An individual is "dangerous to others" when evidence is presented

> that within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct.

N.C. Gen. Stat. § 122C-3(11)(b). As a result, in order to conclude that the respondent is dangerous to others, the trial court must find three elements:

> (1) Within the [relevant] past

(2) Respondent has

(a) inflicted serious bodily harm on another, *or*

(b) attempted to inflict serious bodily harm on another, *or*

(c) threatened to inflict serious bodily harm on another, *or*

(d) has acted in such a manner as to create a substantial risk of serious bodily harm to another, [or (e) has engaged in extreme destruction of property,] and

(3) There is a reasonable probability that such conduct will occur again.

In re Monroe, 49 N.C. App. 23, 30-31, 270 S.E.2d 537, 541 (1980).[2] No finding of an overt act is required to support a conclusion that an individual is dangerous to others. *Id.* at 31, 270 S.E.2d at 541.

In the instant case, the only findings of fact relevant to the conclusion that Respondent was dangerous to others were (1) Respondent's statement that he was a "commander [and] if [a York County, South Carolina] judge makes [the] wrong decision in his court case [then] he will extract the judge [and] have his own hearing [and] same [at] Rock Hill PD"; and (2) Respondent's texts that he "had 400 rounds" and "was going to start a war." However, there was no explicit finding that there was a reasonable probability of future harm to others. *Whatley*, 224 N.C. App. at 274, 736 S.E.2d at 531 (holding that the trial court's conclusion that the respondent was a danger to others was unsupported because the trial court's findings described past conduct and drew no connection to future danger to others). Again, although the trial court need not say the magic words "reasonable probability of future harm," it must draw a nexus between past conduct and future danger. *Id.* at 273, 736 S.E.2d at 531.

The trial court's findings fail to support its conclusion that Respondent was a danger to others absent commitment, and accordingly the Commitment Order cannot be upheld.

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2. *Monroe* was decided under a definition of "dangerous to others" provided in N.C. Gen. Stat. § 122-58.2(1)(b) that did not include engaging in extreme destruction of property. That statute was repealed and recodified into the current definition in Chapter 122C that includes engaging in extreme destruction of property. *See* 1979 N.C. Sess. Laws. 1260, 1261, ch. 915, § 1; 1985 N.C. Sess. Laws. 670, 672, ch. 589, §§ 1, 2.

III. Conclusion

The trial court's findings were insufficient to justify the involuntary commitment of Respondent. The trial court's order lacked any finding that a reasonable probability of some future harm existed, either to Respondent or to others, absent his commitment. Thus, the Involuntary Commitment Order is vacated, and this matter is remanded to the trial court for it to make additional findings to support its conclusions.

VACATED AND REMANDED.

Judges TYSON and COLLINS concur.

JOCELYN KENNEDY, PLAINTIFF
v.
SAMUEL DEANGELO, DDS; SAMUEL J. DEANGELO, DDS, MS, P.A.; KELLY C. PRETTYMAN, DDS; CHARLES FERZLI, DDS, P.A. D/B/A SMILES OF CARY AND CHARLES FERZLI, DDS, P.A., DEFENDANTS

No. COA18-603

Filed 19 February 2019

Medical Malpractice—Rule 9(j)—general dentist—experts of different specialties—required findings

In a medical malpractice action, the record supported the trial court's determination that plaintiff could not reasonably have expected her Rule 9(j) experts (a periodontist and an oral surgeon) to testify to the standard of care applicable to defendant (a general dentist). However, the order dismissing the medical malpractice claims for failure to comply with Rule 9(j) was vacated and remanded because it did not contain the required findings of fact.

Appeal by plaintiff from order entered 26 February 2018 by Judge R. Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 14 November 2018.

The Epstein Law Firm, PLLC, by Andrew J. Epstein, for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by John W. Minier and David M. Fothergill, for defendants-appellees.

DIETZ, Judge.

Plaintiff Jocelyn Kennedy appeals the dismissal of her medical malpractice claims against Dr. Kelly Prettyman and her employer for failure to comply with Rule 9(j) of the Rules of Civil Procedure. Dr. Prettyman is a general dentist and the malpractice claims against her relate to the practice of general dentistry. But the experts Kennedy identified in the Rule 9(j) certification are a periodontist and an oral surgeon, neither of whom regularly practices in the field of general dentistry.

As explained below, the record supports the trial court's determination that Kennedy could not reasonably have expected these experts to testify to the standard of care applicable to Dr. Prettyman. But, as Dr. Prettyman concedes, the trial court's order does not contain the necessary findings of fact required by our precedent. Accordingly, we vacate the trial court's order and remand for further proceedings. On remand, the trial court, in its discretion, may enter a new order based on the existing record, or may conduct any further proceedings that the court deems necessary for the just resolution of this matter.

Facts and Procedural History

Dr. Kelly C. Prettyman is a general dentist who works for Dr. Charles Ferzli, DDS, P.A. d/b/a Smiles of Cary. In August 2013, Jocelyn Kennedy consulted Dr. Prettyman about a toothache. At the appointment, Kennedy told Dr. Prettyman that she previously had undergone surgery and radiation treatment for oral cancer. Dr. Prettyman diagnosed Kennedy with a severe periodontal defect and referred Kennedy to Dr. Samuel DeAngelo, a periodontist who specialized in treating these conditions.

Dr. DeAngelo developed a treatment plan for Kennedy that involved extracting several of her teeth and placing multiple implants. Later, Dr. Prettyman met with Dr. DeAngelo to review the treatment plan and agreed to order and place a temporary partial denture for Kennedy after the surgery. This was the full extent of Dr. Prettyman's involvement in the initial treatment planning. Although the proposed surgery typically poses risks of osteoradionecrosis and other healing issues in patients with prior oral radiation therapy, Dr. Prettyman did not discuss these risks with Kennedy or with Dr. DeAngelo.

On 19 September 2013, Dr. DeAngelo extracted eleven of Kennedy's teeth and placed seven implants. That same day, Dr. Prettyman delivered and placed a denture after the surgery was complete.

By early October 2013, Kennedy's surgical wound on her lower gums opened up. When Dr. DeAngelo could not close up the wound, he referred Kennedy to an oral surgeon, Dr. Jeffrey Jelic, who sent her to the Center for Hyperbaric Medicine at Duke University to receive hyperbaric oxygen treatments. Kennedy's treating physicians at Duke diagnosed her with osteoradionecrosis. Today, Kennedy continues to suffer severe post-surgical complications, including difficulty speaking and eating, permanent tooth loss, distortion of her face, and a high pain level.

On 22 July 2016, Kennedy filed a malpractice suit against Dr. Prettyman and her employer, as well as Dr. DeAngelo and others involved in her treatment. The complaint alleged that Dr. Prettyman was negligent when she placed the temporary denture in Kennedy's mouth, without support, immediately after her teeth were extracted; failed to discuss the relevant risks with Kennedy beforehand; and failed to refer Kennedy to another provider with more experience treating patients with a history of oral cancer treatment. Kennedy's complaint also included expert witness certifications as required by Rule 9(j) of the North Carolina Rules of Civil Procedure.

At the time Kennedy filed her complaint, she designated only two experts: Dr. Jelic, the oral surgeon who referred her to Duke, and Dr. Jeffery Thomas, her periodontist. Both experts hold dental licenses and are board-certified in their respective specialties. During depositions, both experts testified that Dr. Prettyman had breached the standard of care for general dentists.

Dr. Jelic testified that oral surgeons "do the same thing" general dentists do but that Dr. Prettyman's general dentistry practice "is not the same specialty as [his] practice." Similarly, Dr. Thomas testified he did not "have the exact same practice" as Dr. Prettyman, explaining he "did procedures that the general dentist would do" but that he "wasn't doing general dentistry." Both experts testified they did not hold themselves out as general dentists.

Both experts also testified to having some experience working with dentures. Dr. Jelic explained that his practice prohibits him from actually making dentures—a task he defers to general dentists—but he does "deliver them all the time." He also replied affirmatively when asked whether he ever modified dentures, saying it is "part of what oral surgeons do. . . . You realign them. You take away pressure sores. That's very common." Dr. Thomas testified that he fabricates temporary dentures and that he did so multiple times in the year preceding Kennedy's

surgery. When asked about delivering and placing temporary dentures, Dr. Thomas testified that his role ran the "gamut from doing it independently completely myself, attaching it to temporary implants, to having the general dentist come in there and just watch me, to having a general dentist come in, deliver, and adjust the bite, and then I check it."

Following a mediated settlement, Kennedy voluntarily dismissed with prejudice her claims against all defendants except Dr. Prettyman and her employer. On 10 January 2018, Dr. Prettyman and her employer moved to dismiss under Rule 9(j) and moved for summary judgment. Following a hearing, the trial court entered an order granting Defendants' motion to dismiss and declining to hear the motion for summary judgment as moot. Kennedy timely appealed.

Analysis

Kennedy challenges the trial court's dismissal of her claims against Dr. Prettyman and her employer for failure to comply with Rule 9(j) of the Rules of Civil Procedure. Whether a litigant satisfied Rule 9(j) in a medical malpractice action is a question of law that this Court reviews *de novo*. *Braden v. Lowe*, 223 N.C. App. 213, 217, 734 S.E.2d 591, 595 (2012).

Rule 9(j) is a special pleading requirement for medical malpractice actions. The rule "serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review before filing of the action." *Estate of Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 401, 731 S.E.2d 500, 504 (2012). The relevant provision for our analysis is Rule 9(j)(1), which requires the complaint to specifically assert "that the medical care . . . ha[s] been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1).

Even if a complaint facially complies with the requirements of Rule 9(j), the trial court may dismiss it "if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable." *Estate of Wooden*, 222 N.C. App. at 403, 731 S.E.2d at 506.

But, importantly, if the trial court determines that a complaint is subject to dismissal on this ground, "the court must make written findings of fact to allow a reviewing appellate court to determine whether

those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination." *Id.*

With this standard in mind, we turn to the trial court's order in this case. The critical facts relevant to this Court's review are not disputed by the parties: Dr. Prettyman is a general dentist. The health care treatment Dr. Prettyman provided to Kennedy was consistent with the care provided by a general dentist—Dr. Prettyman saw Kennedy for severe tooth pain; referred Kennedy to a periodontist; and, after the periodontist extracted a number of Kennedy's teeth, placed a temporary denture to replace the extracted teeth.

The two experts on which Kennedy relied in the Rule 9(j) certification are not general dentists. Dr. Jelic is an oral surgeon. Dr. Jelic does not practice general dentistry and testified that, as an oral surgeon, he does not practice the "same specialty" as Dr. Prettyman. Similarly, Dr. Thomas is a periodontist, a health care professional who treats diseases of the gums and other structures supporting the teeth. He does not practice general dentistry and likewise testified that, as a periodontist, he does not have the "same practice" as Dr. Prettyman.

The parties also concede that this case is governed by Rule 702(b) of the Rules of Evidence, which addresses expert testimony against a "specialist." N.C. Gen. Stat. § 8C-1, Rule 702(b). Although there are separate evidentiary standards in Rule 702(c) for expert testimony against a "general practitioner," and a general dentist like Dr. Prettyman certainly could be thought of as a "general practitioner" in the ordinary sense, this Court has interpreted that term to apply only "to physicians" and not to those practicing in the fields of "dentistry, pharmacy, optometry, chiropractic, and nursing." *FormyDuval v. Bunn*, 138 N.C. App. 381, 387, 530 S.E.2d 96, 100 (2000).

We thus examine the standard for expert testimony against a specialist in Rule 702(b). The relevant portion of the rule states that experts can testify about the applicable standard of care for a specialist only if the experts "[s]pecialize in the same specialty" or "[s]pecialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients." N.C. Gen. Stat. § 8C-1, Rule 702(b)(1).

Kennedy first asserts that "[d]entistry is its own specialty, and therefore Dr. Jelic and Dr. Thomas, both of whom practice within the specialty of 'dentistry' and were licensed dentists at the time of the initial pleading in this case, qualify as experts against Dr. Prettyman." This argument is

squarely precluded by our precedent. *See Roush v. Kennon*, 188 N.C. App. 570, 574–76, 656 S.E.2d 603, 606–07 (2008). In *Roush*, this Court held that a general dentist practices a different specialty than an oral surgeon. *Id*. Under *Roush*, Dr. Prettyman, a general dentist, Dr. Thomas, a periodontist, and Dr. Jelic, an oral surgeon, all practice in separate, distinct specialties.

Kennedy next argues that, even if the two experts were not specialists in general dentistry, they can testify to the standard of care for a general dentist because Kennedy established that these experts specialize in a similar specialty; perform the same procedures that Dr. Prettyman performed in this case; and have prior experience treating similar patients. *See* N.C. Gen. Stat. § 8C-1, Rule 702(b)(1)(b). Here, Kennedy relies heavily on *Roush*, where this Court permitted a general dentist to testify to the standard of care for an oral surgeon. But in this argument, Kennedy downplays the key holding from *Roush*: although the expert in that case was a general dentist, he "possessed significant experience in the field of oral surgery." 188 N.C. App. at 575, 656 S.E.2d at 607. Indeed, the expert chose to make oral surgery a large part of his practice, although many general dentists do not. As the Court observed, "there is a clear difference between a general dentist, and one who chooses to also practice oral surgery." *Id*. at 576, 656 S.E.2d at 607.

The experts in this case appear readily distinguishable from the expert in *Roush*. There is no evidence in the record that either Dr. Thomas or Dr. Jelic chose to also practice general dentistry as well as their primary specialty. To the contrary, their deposition testimony and other evidence indicates that these experts did the opposite; they eschewed general dentistry and instead focus their skills on a separate specialized field, either periodontics or oral surgery. Moreover, the record before this Court indicates that, in these separate specialties, these experts treat patients in a different context than a general dentist—focusing on patients with particular conditions that fit their specializations. This raises legitimate concerns that the standard of care these experts apply in their more specialized practices would differ from the standard applicable to a general dentist who sees patients with a broad range of conditions.

As a result, we are persuaded that, on this record, the trial court could have made findings that would have supported a determination that these experts did not qualify to testify to the standard of care applicable to a general dentist. But, as Dr. Prettyman concedes, the trial court did not make the findings required by our precedent, and that, in turn, prevents this Court from engaging in meaningful appellate review of the

trial court's determination. *Estate of Wooden*, 222 N.C. App. at 403, 731 S.E.2d at 506. Dr. Prettyman asserts that this Court should "remand the case to the trial court to have the trial court revise the Order to include findings of fact."

We agree that the appropriate disposition of this case is to vacate the trial court's order and remand. On remand, the trial court, in its discretion, may enter a new order based on the existing record, or may conduct any further proceedings that the court deems necessary for the just resolution of this matter.

Conclusion

We vacate and remand the trial court's order for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges STROUD and MURPHY concur.

NANNY'S KORNER DAY CARE CENTER, INC., PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF CHILD DEVELOPMENT AND EARLY EDUCATION, DEFENDANT

No. COA18-679

Filed 19 February 2019

1. Statutes of Limitation and Repose—negligence claim—not tolled by pursuit of administrative remedies

The three-year statute of limitations for negligence claims was not tolled by the pursuit of an administrative remedy in a claim against the State arising from the failure of the Department of Health and Human Services to conduct an independent investigation of an allegation of child abuse at a day care center. Plaintiff sought monetary damages, a remedy not available through appeal from the final agency decision under the North Carolina Administrative Procedure Act.

2. Constitutional Law—due process—state constitution—availability of adequate state remedy

The Tort Claims Act provided an adequate state remedy for a due process claim arising from alleged agency negligence in not

conducting an independent investigation of a child abuse claim against a day care center. If plaintiff's claim under the Tort Claims Act had been successful, that remedy would have compensated plaintiff for the same injury alleged in the constitutional claim. Plaintiff's failure to comply with the applicable statute of limitations did not render its remedy inadequate.

Appeal by Plaintiff Nanny's Korner Day Care Center, Inc. from order entered 12 March 2018 by Judge C. Winston Gilchrist in Robeson County Superior Court. Heard in the Court of Appeals 14 January 2019.

Ralph T. Bryant, Jr., for Plaintiff-Appellant Nanny's Korner Day Care Center, Inc.

North Carolina Attorney General Josh Stein, by Assistant Attorney General Alexandra Gruber, for Defendant-Appellee.

HUNTER, JR., Robert N., Judge

Plaintiff Nanny's Korner Day Care Center, Inc. ("Plaintiff") appeals from an order dismissing its complaint against the North Carolina Department of Health and Human Services, Division of Child Development and Early Education ("Defendant") for failure to state a claim upon which relief may be granted based on the statute of limitations. We affirm.

I. Factual & Procedural History

On 5 November 2009, Defendant received a report that an eight-year-old girl enrolled at Plaintiff's daycare center complained a staff member at the facility had touched her inappropriately. The complaint prompted an investigation by Sharon Miller ("Ms. Miller"), an abuse and neglect consultant for Defendant, and a social worker from the Robeson County Department of Social Services ("DSS"). The investigation consisted of visits to the child's school and home to interview the child, as well as the child's guidance counselor, teacher, mother, and sibling. Ms. Miller and the social worker then visited Plaintiff's facility to interview staff members. While there, Ms. Miller and the social worker also interviewed Plaintiff's CEO, Bernice Cromartie ("Mrs. Cromartie"), as well as the accused, her husband Ricky Cromartie ("Mr. Cromartie"). Mr. Cromartie, now deceased, was a teacher and maintenance worker at Plaintiff's facility. Mr. Cromartie denied inappropriately touching the

child, and requested a polygraph test, which he passed with no deception. No criminal charges were filed against Mr. Cromartie.

On 2 February 2010, Ms. Miller received notice that DSS completed its investigation and "substantiated" the allegations of sexual abuse against Mr. Cromartie.[1] On 4 February 2010, Ms. Miller submitted a Case Decision Summary of Defendant's investigation to her supervisor, noting DSS had substantiated the allegations of inappropriate touching of a child at Plaintiff's facility by Mr. Cromartie.

In June 2010, Defendant's Internal Review Panel ("the Panel") determined the appropriate administrative action was a written warning. The Panel also reviewed its decision to prohibit Mr. Cromartie from Plaintiff's facility during operating hours, and upheld the decision, citing DSS's substantiation of child sexual abuse. The Panel agreed the decision would remain in effect unless substantiation was overturned. Defendant never conducted an independent investigation into the allegations, but rather relied on DSS's substantiation of child sexual abuse in its decision to issue a written warning to Plaintiff. Defendant did not give Plaintiff or Mr. Cromartie a hearing to contest the finding of substantiation of abuse.

After a timely petition by Plaintiff for a contested case hearing in the Office of Administrative Hearings ("OAH"), a hearing on the petition was held on 12 July 2011. Despite expressing doubts about whether Mr. Cromartie sexually abused the child at Plaintiff's facility, the Administrative Law Judge affirmed the Division's decision to issue a written warning to Plaintiff and restrict Mr. Cromartie from the property when children were present. In its conclusion of law, the Administrative Law Judge concluded:

> 11. The only issue before the undersigned is whether respondent acted properly in issuing the written warning to Petitioner's family child care center, and in implementing the Correct Action plan prohibiting Ricky Cromartie from being on the child care facility premises while children are in care.

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1. N.C. Gen. Stat. § 7B-302 details the required assessment that must be completed by the Director of the Department of Social Services when a report of abuse, neglect, or dependency is received. *See* N.C. Gen. Stat. § 7B-101 for definitions. We note "substantiated" as used in the statute does not involve an impartial review by a neutral magistrate where an accused has the right to traditional due process protections. *See* discussion *supra*.

> 12. While the preponderance of the evidence before me raises serious questions and/or doubts about whether Mr. Cromartie sexually abused the minor child at Petitioner's center on November 5, 2009, the undersigned lacks the authority and/or jurisdiction to issue a formal determination on the merits of that substantiation. Review of DSS' substantiation is located in another forum other than the Office of Administrative Hearings.

On or about 12 March 2012, Defendant adopted the Administrative Law Judge's order as its Final Agency Decision. Plaintiff then filed a petition in Wake County Superior Court seeking judicial review of Defendant's Final Agency Decision pursuant to N.C. Gen. Stat. § 150B-36[2] of the North Carolina Administrative Procedure Act ("NCAPA"). The Wake County Superior Court upheld the Administrative Law Judge's decision in an order entered on 9 January 2013.

Plaintiff filed a timely notice of appeal to the North Carolina Court of Appeals ("*Nanny's Korner I*"). On 20 May 2014, the Court of Appeals held Defendant erred when it relied upon DSS's substantiation of abuse to issue the written warning to Plaintiff and order Mr. Cromartie to remain off the premises.[3] The Court stated that Defendant was required to conduct an independent investigation into the allegations of abuse, and upon substantiation, allow Plaintiff an opportunity to contest the agency's determination. The Court further stated: "Thus, given the documented evidence in the record showing the impact of [Defendant's] administrative action on [Plaintiff's] livelihood, [Plaintiff] has arguably suffered a deprivation of her liberty interests guaranteed by our State's constitution, necessitating a procedural due process analysis." *Nanny's Korner Care Ctr. v. N.C. HHS*, 234 N.C. App. 51, 64, 758 S.E.2d 423, 431 (2014).

Even though the Court found for Plaintiff in *Nanny's Korner I* and reversed the final agency decision, the damage to Plaintiff had already occurred. The administrative penalty required Plaintiff to notify its

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2. In 2011, the General Assembly revised the contested case procedure set forth in the NCAPA by amending and repealing various statutory provisions in Chapter 150B of the North Carolina General Statutes. *See* 2011 N.C. Sess. Law 1678, 1685-97, ch. 398, §§ 15-55. The amendments went into effect on 1 January 2012. Plaintiff's contested case commenced on 21 July 2010. We therefore conduct our review pursuant to the statutory procedures in effect at the time Plaintiff's contested case was filed with the OAH.

3. In 2016, the General Assembly revised the required process Defendant must take when it receives a report of child maltreatment. *See* 2015 Sess. Law 123. Under the revised law, the Defendant is required to conduct its own investigations of child maltreatment. *See* N.C. Gen. Stat. § 110-105.3. The amendments went into effect on 1 January 2016.

customers on or around 15 June 2010 that a report of child abuse at the daycare center had been substantiated. Consequently, Plaintiff began to lose customers and was eventually forced to close its doors. "The injury was real, immediate, and inescapable."

On 23 January 2017, Plaintiff filed a Tort Claims Act Affidavit with the North Carolina Industrial Commission alleging negligence by Defendant for failing to conduct an independent investigation into the allegations of child sexual abuse. In the Affidavit, Plaintiff claimed $600,000 in damages under the North Carolina Tort Claims Act ("Tort Claims Act"). On 20 March 2017, Defendant filed a Motion to Dismiss in accordance with Rule 12(b)(6), and on 4 May 2017, Deputy Commissioner Robert J. Harris granted Defendant's motion and dismissed the claim with prejudice. Plaintiff then appealed to the Full Commission, which heard the matter on 18 October 2017. On 21 December 2018, after Plaintiff filed notice of appeal for the instant action, the Industrial Commission dismissed Plaintiff's tort claim, stating that the claim fell outside the Tort Claims Act's three-year statute of limitations.

On 22 May 2017, Plaintiff filed the instant action in Robeson County Superior Court, alleging a violation of its due process rights under Article 1, section 19 of the North Carolina Constitution. Plaintiff's complaint alleged in pertinent part:

> 22. The defendant enforced the administrative action without conducting an independent determination of whether child abuse had occurred at plaintiff's facility.
>
> 23. Plaintiff was never allowed the opportunity to have a hearing to contest the finding of substantiation of abuse occurring at plaintiff's facility.
>
> 25. The defendant merely adopted the local DSS finding of a substantiation of abuse.
>
> 26. The defendant violated plaintiff's constitutional right to due process when it issued administrative action, without conducting an independent investigation to substantiate abuse. In so doing the plaintiff was deprived on [its] due process right in that plaintiff had a protected interest in the day care licensing and a right to be free from administrative action without due process of law.
>
> 32. The Administrative Procedure Act does not provide a remedy for the plaintiff to recover for the harm caused

> by the deprivation of plaintiff's due process rights, namely, harm to reputation, loss of goodwill, lost income and profits.
>
> 33. Because of the defendant's violation of plaintiff's due process rights, plaintiff's business was completely decimated and plaintiff lost all income from the day care operation.
>
> 34. There is no adequate remedy at state law for plaintiff to redress the violation of [its] constitutional rights and the resultant harm of lost reputation, business goodwill and lost profits from the business.
>
> 43. Article I, Section 19 of the North Carolina Constitution warrants that "[no] person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. N.C. Const. art. I § 19.
>
> 51. Plaintiff was deprived of the liberty interest guaranteed under the North Carolina Constitution.

On 17 October 2017, Defendant filed an Answer and Motion to Dismiss for failure to state a claim upon which relief may be granted. Defendant notified Plaintiff of a hearing on the Motion to Dismiss to take place on 12 February 2018, and on 5 February 2018, Defendant submitted a brief in support of the Motion to Dismiss. On 12 February 2018, Plaintiff filed its brief in opposition to the Motion to Dismiss. On 12 March 2018, the Honorable Judge C. Winston Gilchrist of Robeson County Superior Court granted Defendant's motion and dismissed Plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 9 April 2018, Plaintiff filed a timely notice of appeal to the North Carolina Court of Appeals from the judgment and order of the superior court.

II. Jurisdiction & Standard of Review

Plaintiff's appeal from the superior court order lies as of right to this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017). "We review a motion to dismiss for failure to state a claim *de novo*." *Doe v. Charlotte-Mecklenburg Bd. of Educ.*, 222 N.C. App. 359, 365, 731 S.E.2d 245, 249 (2012) (citing *Bobbitt ex. rel. Bobbitt v. Eizenga*, 215 N.C. App. 378, 379, 715 S.E.2d 613, 615 (2011)).

When considering a motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure, we consider "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Hinson v. City of Greensboro*, 232 N.C. App. 204, 208, 753 S.E.2d 822, 826 (2014). "[O]nce a defendant raises the affirmative defense of the statute of limitations, the burden shifts to the plaintiff[] to show their action was filed within the prescribed period." *Asheville Lakeview Properties, LLC v. Lake View Park Commission, Inc.*, 803 S.E.2d 632, 636 (2017). "Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013). "A statute of limitations can be the basis for dismissal on a Rule 12(b)(6) motion if the face of the complaint discloses that plaintiff's claim is so barred." *Reunion Land Co. v. Village of Marvin*, 129 N.C. App 249, 250, 497 S.E.2d 446, 447 (1998) (citations omitted). It is well settled that "[q]estions of statutory interpretations are ultimately questions of law for the courts." *Ray v. North Carolina Dept. of Transp.*, 366 N.C. 1, 9, 727 S.E.2d 675, 681-82 (2012). Accordingly, we review *de novo* the superior court's order granting dismissal.

III. Analysis

Plaintiff argues its constitutional procedural due process claim was improperly dismissed under Rule 12(b)(6) of the Rules of Civil Procedure because the statute of limitations was tolled while Plaintiff exhausted its administrative remedies. Unfortunately, we must disagree.

On appeal, Plaintiff raises two primary issues for the Court: (1) whether the superior court erred when it granted Defendant's Motion to Dismiss Plaintiff's procedural due process claim; and (2) whether the superior court erred when it failed to apply the Doctrine of Judicial Estoppel to prevent Defendant from taking an inconsistent position before the Industrial Commission. Because Plaintiff at oral argument on 14 January 2019 waived the Judicial Estoppel issue, we need not address it here.

In support of its position that the superior court erred in granting Defendant's Motion to Dismiss its procedural due process claim, Plaintiff argues (1) Plaintiff alleged sufficient facts to support a constitutional claim; (2) The Law of the Land Clause provides a remedy; (3)

Plaintiff's claim is not barred by sovereign immunity; (4) The statute of limitations was tolled while Plaintiff pursued administrative remedies through *Nanny's Korner I*; and (5) Plaintiff is entitled to recover monetary damages for its direct constitutional claim. Even though this appeal is resolved by a determination of the statute of limitations issue, we will briefly address the procedural due process claim.

A. Statute of Limitations

[1] The statute of limitations in North Carolina for both constitutional and negligence claims is three years. *See* N.C. Gen. Stat. § 1-52 (2017). The accrual of the statute of limitations period typically begins "when the plaintiff is injured or discovers he or she has been injured." *Christie v. Hartley Constr., Inc.*, 367 N.C. 534, 538, 766 S.E.2d 283, 286 (2014). However, "[w]hen the General Assembly provides an effective administrative remedy by statute, that remedy is exclusive and the party must pursue and exhaust it before resorting to the courts." *Jackson for Jackson v. North Carolina Dept. of Human Resources Div. of Mental Health, Developmental Disabilities, & Substance Abuse Servs.*, 131 N.C. App. 179, 186, 505 S.E.2d 899, 903-04 (1998). Nevertheless, the exhaustion of administrative remedies doctrine is inapplicable when the remedies sought are not considered in the administrative proceeding. *Philips v. Pitt County Mem. Hosp., Inc.*, 222 N.C. App. 511, 522, 731 S.E.2d 462, 470 (2012). Under those circumstances, "the administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court." *Johnson v. First Union Corp.*, 128 N.C. App. 450, 456, 496 S.E.2d 1, 5 (1998).

Plaintiff argues the statute of limitations was tolled while Plaintiff exhausted its administrative remedies through the appeal of Defendant's final agency decision in *Nanny's Korner I*. Plaintiff contends the exhaustion of administrative remedies doctrine required Plaintiff to exhaust its remedy through the claim under the NCAPA before Plaintiff's right to bring a constitutional claim arose. Accordingly, Plaintiff argues that its cause of action for the alleged due process violation did not accrue until 9 June 2014, when this Court issued its mandate in *Nanny's Korner I*.

Conversely, Defendant contends the statute of limitations began to run on or about 15 June 2010, around the time Defendant issued its written warning to Plaintiff. Defendant argues it is reasonable to conclude the alleged damages occurred near the time of the issuance of the written warning requiring Plaintiff to warn its customers and keep Mr. Cromartie off the premises. Defendant also argues the statute of

limitations was not tolled by the pursuit of administrative remedies under the exhaustion of administrative remedies doctrine since Plaintiff sought monetary damages, a remedy not available under the NCAPA. Defendant further suggests that even Plaintiff viewed the remedy under the statute as inadequate, "since it prevailed in its case against the agency, *i.e. Nanny's Korner I*, but now seeks a monetary remedy under both the North Carolina Tort Claims Act and the Law of the Land Clause." Accordingly, Defendant argues the statute of limitations was not tolled, and has long since run.

We hold the statute of limitations began to run on or about 15 June 2010, when Defendant issued the written warning to Plaintiff. Defendant's written warning was the "breach" that proximately caused—in Plaintiff's own words—a "real, immediate, and inescapable" injury. The statute of limitations began to run when Plaintiff was injured or discovered the injury, which in this case happened almost simultaneously. The statute of limitations was not tolled while Plaintiff pursued its administrative remedies in *Nanny's Korner I* because in that action, Plaintiff sought a remedy not available through the NCAPA—namely, monetary damages. In its complaint, Plaintiff acknowledges that the NCAPA "does not provide a remedy for . . . lost income and profits." Therefore, the statute of limitations was not tolled while Plaintiff pursued its administrative remedies, and the filing of the instant claim on 22 May 2017 fell outside the statute of limitations. We affirm the trial court.

B. Constitutional Procedural Due Process Claim

[2] Plaintiff contends it sufficiently plead a direct claim against the State of North Carolina for a violation of its due process rights guaranteed under the state constitution. " '[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution.' " *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009) (quoting *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992)). "[P]laintiffs have the burden of showing, by allegations in the complaint, that the particular remedy is inadequate." *Shell Island Homeowners Ass'n Inc. v. Tomlinson*, 134 N.C. App. 217, 223, 517 S.E.2d 406, 411 (1999). "An adequate remedy must provide the possibility of relief under the circumstances." *Craig* at 340, 678 S.E.2d at 355. "An adequate state remedy exists if, assuming the plaintiff's claim is successful, the remedy would compensate the plaintiff for the same injury alleged in the direct constitutional claim." *Estate of Fennell v. Stephenson*, 137 N.C. App. 430, 437, 528 S.E.2d 911, 915-16 (2000) (*rev'd on other grounds by* 354 N.C. 327, 554 S.E.2d 629 (2001)). Further,

a plaintiff must still win other pretrial motions, including filing a timely claim. *Craig* at 340, 678 S.E.2d at 355.

Plaintiff argues it has the right to bring a direct constitutional claim since no adequate state remedy exists. In its complaint, Plaintiff states that the NCAPA "does not provide a remedy for the plaintiff to recover for the harm caused by the deprivation of plaintiff's due process rights, namely, harm to reputation, loss of goodwill, lost income and profits." Plaintiff also argues the dismissal of its claim at the Industrial Commission proves it does not have an adequate state remedy. "Certainly, a cause of action under the Tort Claims Act that expires before the right to bring the constitutional law claim even arose, cannot be an adequate remedy at law."

Defendant argues Plaintiff does not have a direct constitutional claim because it had an adequate state remedy in the form of the Industrial Commission through the Torts Claim Act. We agree. The Tort Claims Act explicitly grants authority to the North Carolina Industrial Commission to hear tort claims against State agencies. *See* N.C. Gen. Stat. § 143.291(a) (2017). Plaintiff pursued that remedy when it filed an affidavit at the Industrial Commission on 23 January 2017, alleging negligence on the part of Defendant and seeking $600,000 in damages. Nonetheless, the Full Commission dismissed Plaintiff's claim on 21 December 2018, citing the Tort Claims Act's three-year statute of limitations.[4] Plaintiff's failure to comply with the applicable statute of limitations does not render its remedy inadequate. An adequate state remedy existed because, assuming Plaintiff's claim under the Tort Claims Act had been successful, the remedy would have compensated Plaintiff for the same injury alleged in the constitutional claim.

Accordingly, because the Tort Claims Act provided an adequate state remedy for Plaintiff's claim, Plaintiff does not have a direct constitutional claim against the State under the North Carolina Constitution.

IV. Conclusion

Because Plaintiff had an adequate state remedy for its procedural due process claim but did not pursue it within the three-year statute of limitations, we affirm the trial court.

AFFIRMED.

Chief Judge McGee and Judge Hampson concur.

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4. *See* N.C. Gen. Stat. § 1-52 (2017).

STATE OF NORTH CAROLINA
v.
REINE STRUDDY AUGUSTIN, DEFENDANT

No. COA18-373

Filed 19 February 2019

Search and Seizure—reasonable suspicion—totality of evidence—defendant backing away from officer

The trial judge did not err by denying defendant's motion to suppress evidence of a handgun that fell from defendant's waistband when he was seized. The trial court found that defendant was out at an unusual hour in deteriorating weather, defendant was in an area where a crime spree had occurred, defendant's companion lied about his name and both gave vague answers about where they were coming from, and defendant's companion ran as he was being searched. The findings, taken together, support the conclusion that the officer had reasonable suspicion to search defendant. There was no need to determine whether it was appropriate to consider the fact that defendant was backing away; the findings concerning the pair's behavior prior to that occurring were sufficient.

Appeal by Defendant from judgment entered 7 December 2017 by Judge Anna M. Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 17 October 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas O. Lawton III, for the State.

Irons & Irons, PA., by Ben G. Irons, II, for the Defendant.

DILLON, Judge.

Defendant Reine Struddy Augustin appeals from the trial court's judgment following his guilty plea for carrying a concealed handgun. Defendant challenges the trial court's denial of his motion to suppress the gun. We find no error.

I. Background

The arresting officer discovered Defendant carrying a concealed handgun during a stop. Defendant moved to suppress the discovery of the gun, contending that the officer did not have reasonable suspicion to

seize Defendant. The findings the trial court made based on the evidence presented at the suppression hearing tended to show as follows:

On 22 January 2016 at 1:37 a.m., the arresting officer was patrolling a high-crime area in Salisbury when he saw Defendant and Ariel Peterson walking together on a sidewalk. It was snowing, and the officer had not seen anyone else out on the roads. The officer stopped his car and approached the two men. Though he was not investigating anything at the time, the officer was aware of multiple recent crimes in the area. The officer had prior interactions with Defendant and knew Defendant lived some distance away.[1]

The officer asked Defendant and Mr. Peterson their names. Initially, Mr. Peterson gave a false name. Defendant did not.

The officer asked Defendant and Mr. Peterson where they were coming from and where they were going. Both Mr. Peterson and Defendant gave vague answers. Specifically, though both claimed that they had been at the house of Mr. Peterson's girlfriend and were walking back to Defendant's home, they were unable or unwilling to provide the location where Mr. Peterson's girlfriend lived.

Defendant then asked the officer for a ride to his house. The officer agreed, and the three walked to the rear passenger door of the patrol car. The officer then informed Defendant and Mr. Peterson that police procedure required him to search them prior to allowing them in the patrol car. Up to this point, Defendant had been polite, cooperative, and courteous.

As the officer began to frisk Mr. Peterson, Mr. Peterson turned and quickly ran away. The officer turned to Defendant, who had begun taking steps away from the officer. The officer believed that Defendant was about to run away as well, so he grabbed Defendant's shoulders, placed Defendant face-down on the ground, and handcuffed him. As the officer rolled Defendant over to help him stand to his feet, the officer observed a handgun that had fallen out of Defendant's waistband.

The trial court's order also included the following findings of fact:

> 28. Prior to [Mr. Peterson] running away, the officer's encounter with these two young men was a consensual encounter.

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1. The officer met Defendant on a prior occasion. The officer noted at the suppression hearing that he knew Defendant, and was aware that Defendant lived roughly twenty (20) blocks from the location of the encounter.

> 29. [Mr. Peterson's] flight and the officer's belief Defendant was going to flee provided the officer reasonable suspicion a crime is, was, or was about to be committed and permitted the officer to physically detain Defendant for further investigation.

Based on its findings, the trial court concluded, in part, as follows:

> 1. Based on the totality of the circumstances, to include these individuals [sic] young age, the icy weather conditions, the time of night that [the officer] encountered them, Peterson initially providing a false name and date of birth and saying he did so because he didn't like cops, and that the encounter up to the point that Peterson fled was consensual, the court finds that [the officer] had reasonable suspicion to physically detain Defendant for further investigation.

After his motion to suppress was denied, Defendant pleaded guilty to carrying a concealed handgun, reserving his right to appeal the denial of his motion to suppress. Defendant timely appealed.

II. Analysis

Defendant argues that he was unlawfully seized when the officer discovered the gun. We disagree.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Saldierna*, 369 N.C. 401, 405, 794 S.E.2d 474, 477 (2016) (citation omitted). Factual findings by the trial judge are binding on appeal if there is evidence to support them, even if the evidence might lead to an alternate finding. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Conclusions of law made by the trial judge are reviewed *de novo*. *State v. Ortiz-Zape*, 367 N.C. 1, 5, 743 S.E.2d 156, 159 (2013).

Both the federal and North Carolina constitutions protect persons from "unreasonable searches and seizures." U.S. Const. amend. IV; N.C. Const. art. I, § 20. In order to seize and detain a person, an officer must have reasonable suspicion that a crime has been or is about to be committed. *See State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). Reasonable suspicion "must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Id.* at 441-42, 446 S.E.2d at 70.

The trial court made a number of findings. Though each finding, standing alone, may not give rise to reasonable suspicion, we must determine whether the findings, *taken together*, do give rise to reasonable suspicion.

Here, Defendant challenges the trial court's finding that he was likely to flee and argues that this finding should not have been included in the trial court's reasonable suspicion calculus. That is, if the officer did not yet have reasonable suspicion just prior to Defendant's act of backing away, then Defendant was constitutionally free to leave at that point. And the fact that Defendant may have been simply exercising his right to end a consensual encounter should not tip the scales to support reasonable suspicion. We agree that a finding that a defendant was simply exercising his constitutional right to leave a consensual encounter should not be used against Defendant to tip the scale towards reasonable suspicion. *See State v. Icard*, 363 N.C. 303, 318, 677 S.E.2d 822, 832 (2009) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)) (stating that the long-established hallmark of a consensual encounter is that a reasonable person would feel free to leave). We do note, though, that the *manner* in which Defendant exercises this right could, in some cases, be used to tip the scale. *Compare Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000) (stating that the defendant's running away from a consensual encounter with officers may contribute to a reasonable suspicion calculus), *with In re J.L.B.M.*, 176 N.C. App. 613, 622, 627 S.E.2d 239, 245 (2006) (stating that the defendant merely walking away from a patrol car did not support reasonable suspicion).

In any event, we need not determine whether it was appropriate for the trial court to consider the fact that Defendant was backing away in its reasonable suspicion calculus in this case. Rather, for the reasons stated below, we conclude that the findings pertaining to the behavior of Defendant and his companion *prior to* Defendant backing away were sufficient to give rise to reasonable suspicion. *See State v. Mello*, 200 N.C. App. 437, 446-47, 684 S.E.2d 483, 490 (2009), *aff'd per curiam*, 364 N.C. 421, 421, 700 S.E.2d 224, 225 (2010) (holding that erratic behavior and flight exhibited *by the defendant's companions* could be used in the reasonable suspicion calculus). Specifically, the trial court found that Defendant was out at an unusual hour in deteriorating weather. *See State v. Rinck*, 303 N.C. 551, 560, 280 S.E.2d 912, 920 (1981) ("It must be remembered that defendants were walking along the road at an unusual hour for persons to be going about their business."); *State v. Eaton*, 210 N.C. App 142, 145, 707 S.E.2d 642, 645 (2011) (considering bad weather conditions as a factor for reasonable suspicion). The

trial court found that Defendant was present in an area where a spree of crime had occurred. *State v. Tillet*, 50 N.C. App. 520, 524, 274 S.E.2d 361, 364 (1981); *see also State v. Thompson*, 296 N.C. 703, 707, 252 S.E.2d 776, 779 (1979). The trial court found that Defendant's companion lied about his name and that they both gave vague answers about where they were coming from. *State v. Williams*, 366 N.C. 110, 117, 726 S.E.2d 161, 167 (2012) (considering vague answers about travel as factors in the reasonable suspicion calculus). And the trial court found that Defendant's companion ran away as he was being searched. *See State v. Mitchell*, 358 N.C. 63, 69, 592 S.E.2d 543, 547 (2004) (quoting *Wardlow*, 528 U.S. at 125, for the proposition that headlong flight is the "consummate act of evasion" and is "certainly suggestive" of wrongdoing).

We conclude that there was sufficient evidence at the suppression hearing to support the above findings and that these findings, when taken together, support the trial court's conclusion that the officer had reasonable suspicion to seize Defendant. We, therefore, conclude that the trial judge did not err in denying Defendant's motion to suppress.

AFFIRMED.

Chief Judge McGEE and Judge INMAN concur.

STATE OF NORTH CAROLINA
v.
ADAM WARREN CONLEY

No. COA18-305

Filed 19 February 2019

1. Appeal and Error—preservation of issues—constitutional issue—double jeopardy—failure to argue at trial

The Court of Appeals dismissed defendant's argument that the trial court violated his constitutional right against double jeopardy by entering judgment on multiple counts of possession of a gun on educational property, where defendant failed to preserve the argument by presenting it at trial. The court declined to invoke Appellate Rule 2 to reach the merits of the argument because, even assuming error, defendant's sentence would be within the range authorized by the General Statutes.

2. Firearms and Other Weapons—possession on educational property—simultaneous possession of multiple firearms—statute ambiguous—rule of lenity

The trial court erred by entering multiple convictions for defendant's simultaneous possession of multiple firearms on educational property (N.C.G.S. § 14-269.2(b)). Because the statute was ambiguous as to whether multiple punishments for the simultaneous possession of multiple firearms was authorized, the rule of lenity applied, so the evidence supported entry of only one conviction.

Appeal by defendant from judgment entered 16 August 2017 by Judge Robert T. Sumner in Macon County Superior Court. Heard in the Court of Appeals 13 November 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.

BRYANT, Judge.

Where defendant Adam Warren Conley failed to present his constitutional double jeopardy argument before the trial court, it was not properly preserved for our review. Accordingly, we dismiss the constitutional argument defendant presents on appeal. However, where the trial court entered a sentence in excess of statutory authority, we reverse and remand the matter for resentencing on the offenses of possession of a gun on educational property.

On 29 June 2015, a Macon County grand jury issued an indictment which contained eleven offenses against defendant: attempted murder, discharge of a firearm on educational property, six counts of possession of a firearm on educational property, assault by pointing a gun, cruelty to animals, and possession of firearms in violation of a DVPO. The matter came on for trial before a jury during the 7 August 2017 session of Macon County Superior Court, the Honorable Robert T. Sumner, Judge presiding.

The evidence at trial tended to show that on 4 June 2015 at 4:40 a.m., a resident who lived on Union School Road heard several gunshots. Shortly thereafter, the resident observed two people walking down his driveway toward Union School Road. Law enforcement officers

responded to the resident's address and searched the area, but no person, gun, bullets, or shell casings were found.

At 5:00 a.m. that same morning, Alice Bradley was at South Macon Elementary School to prepare her school bus for the morning route. Using her car, Bradley picked up her sister who was parked in the teacher's lot and drove to the school building, where they turned on inside lights and conducted a safety check. At 5:15 a.m., Bradley drove back to her school bus, parked, and noted the presence of two people in the parking lot about twenty yards away. Bradley later identified the two people as defendant and Kathryn Jeter. Defendant pointed a silver handgun at Bradley before he headed toward the athletic field. Bradley boarded her school bus and radioed the bus garage to request a deputy sheriff.

At 5:20 a.m., Sheriff Deputy Audrey Parrish with the Macon County Sheriff's Department responded to South Macon Elementary in response to a 9-1-1 call. When Deputy Parrish encountered defendant and Jeter, she directed them to stop walking away, to turn, and walk toward her. About fifty yards away from Deputy Parrish, defendant turned, raised a "large silver [handgun]," and pointed it at Deputy Parrish. Deputy Parrish testified that it was very quiet; she heard the handgun trigger "snap"; but the gun did not fire. Deputy Parrish retreated to her vehicle, where she radioed for assistance. By 5:30 a.m., several sheriff's deputies had responded to the school and engaged defendant. When defendant was taken into custody, law enforcement officers observed "a large silver gun" and a smaller "Derringer, pocket-style [gun]" on the ground. And in addition to the firearms on the ground, "[defendant] had two guns, one on each side on his waist and holsters, as well as other [large] knives . . . on his person that we could see sticking out of his boot . . . ." Moreover, law enforcement officers located defendant's tote bag on Bradley's school bus. Bradley mentioned that the bag was not there when she walked through the bus at 5:00 a.m., before she and her sister entered the school building. The bag contained a pistol.

At the close of the State's evidence, the trial court dismissed the charge of discharge of a firearm on educational property and violation of the DVPO. Defendant did not present any evidence. The jury returned guilty verdicts against defendant on the charges of attempted first-degree murder, five counts of possession of a gun on educational property, possession of knives on educational property, and assault by pointing a gun. The trial court entered judgments in accordance with the jury verdicts. For attempted first-degree murder, defendant was sentenced to an active term of 170 to 216 months. In a consolidated judgment for three counts of possession of a gun on educational property, defendant was

sentenced to an active term of 6 to 17 months to be served consecutive to the sentence for attempted first-degree murder. In a separate consolidated judgment for two counts of possession of a gun on educational property, one count of weapons on educational property, assault by pointing a gun, and cruelty to animals, defendant was again sentenced to 6 to 17 months to be served consecutive to the judgment for three counts of possession of a gun on educational property; however, this sentence was suspended. The court ordered that for this judgment, following his release from incarceration, defendant was to be placed on supervised probation for a 24-month period. Defendant appeals.

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[1] On appeal, defendant argues that the trial court erred by entering judgments on five counts of possession of a gun on educational property. Defendant contends that constitutional protections against double jeopardy guard against entry of judgment on more than one count of the offense of simultaneous possession of "any gun" on educational property. We dismiss this issue.

Defendant acknowledges that his constitutional challenge to the entry of judgments against him was not presented before the trial court. Pursuant to our Rules of Appellate Procedure, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . ." N.C.R. App. P. 10(a)(1) (2018). "It is a well established rule of [our appellate courts] that [we] will not decide a constitutional question which was not raised or considered in the court below." *Bland v. City of Wilmington*, 278 N.C. 657, 660, 180 S.E.2d 813, 816 (1971) (citation omitted); *see State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." (citing *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)); *see also State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (holding that to the extent the defendant relies on an unpreserved constitutional double jeopardy argument, the argument would not be addressed); *State v. Madric*, 328 N.C. 223, 231, 400 S.E.2d 31, 36 (1991) (same); *State v. Mitchell*, 317 N.C. 661, 670, 346 S.E.2d 458, 463 (1986) (same). In order to reach the merits of his argument, defendant asks that we invoke Rule 2 of our Rules of Appellate Procedure in order to suspend the Rules of Appellate Procedure.

Pursuant to Rule 2, "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may . . . suspend or vary the requirements or provisions

of any of the[] [appellate] rules in a case pending before it . . . ." N.C.R. App. P. 2 (2017).

> Rule 2 must be applied cautiously. . . . "While it is certainly true that Rule 2 has been and may be so applied in the discretion of the Court, we reaffirm that Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." [*Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299–300 (1999)] (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986)).
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> . . . .
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> Before exercising Rule 2[,] . . . the Court of Appeals must be cognizant of the appropriate circumstances in which the extraordinary step of suspending the operation of the appellate rules is a viable option. Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority.

State v. Hart, 361 N.C. 309, 315–17, 644 S.E.2d 201, 205–06 (2007). "Appellate Rule 2 has most consistently been invoked to prevent manifest injustice in criminal cases in which substantial rights of a defendant are affected." *State v. Spencer*, 187 N.C. App. 605, 612, 654 S.E.2d 69, 73 (2007) (citation omitted) (invoking Rule 2 to reach the merits of the defendant's argument where defendant was erroneously convicted of both larceny and possession of the same stolen property).

> This assessment—whether a particular case is one of the rare "instances" appropriate for Rule 2 review—must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether "substantial rights of an appellant are affected." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) (citing, *inter alia*, *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984) (per curiam) ("*In view of the gravity of the offenses for which defendant was tried and the penalty of death which was imposed*, we choose to exercise our supervisory powers under Rule 2 of the Rules of Appellate Procedure and, in the interest of justice, vacate the judgments entered and

> order a new trial.") (emphasis added)). In simple terms, precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis. *See* [*Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008)]; [*Hart*, 361 N.C. 309, 315–17, 644 S.E.2d 201, 204-06 [2007]; *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299–300.

State v. Campbell, 369 N.C. 599, 603, 799 S.E.2d 600, 602–03 (2017); *see also State v. Miller*, 245 N.C. App. 313, 315–16, 782 S.E.2d 328, 330 (declining to invoke Rule 2 to reach the merits of the defendant's unpreserved constitutional double jeopardy argument), *review denied*, ___ N.C. ___, 787 S.E.2d 40 (2016); *State v. Rawlings*, 236 N.C. App. 437, 443–44, 762 S.E.2d 909, 914–15 (2014) (same).

Here, the trial court entered judgments against defendant for the offenses of attempted first-degree murder, five counts of possession of a gun on educational property, one count of weapons on educational property, assault by pointing a gun, and cruelty to animals. The offenses were consolidated into three judgments, each committing defendant to an active term to be served consecutively: 170 to 216 months for attempted first-degree murder; 6 to 17 months for three counts of possession of a gun on educational property; and 6 to 17 months for two counts of possession of a gun on educational property, one count of weapons on educational property, assault by pointing a gun, and cruelty to animals. However, the court suspended the 6 to 17 month active sentence imposed in the judgment entered on two counts of possession of a gun on educational property, one count of weapons on educational property, assault by pointing a gun, and cruelty to animals, instead placing defendant on supervised probation for a period of 24 months. The offenses of possession of a weapon on educational property and cruelty to animals are each Class 1 misdemeanors. N.C. Gen. Stat. §§ 14-269.2(d), -360(a) (2017). The offense of assault by pointing a gun is a Class A1 misdemeanor. *Id.* § 14-34. A conviction for a Class A1 misdemeanor authorizes a trial court to impose on a defendant with a Level III prior record level (such as defendant's misdemeanor prior record level, here) a term of 1 to 150 days of community, intermediate, or active punishment, *id.* § 15A-1340.23(c), and authority to suspend that sentence and place defendant on supervised probation for a period of up to 24 months, *id.* § 15A-1343.2(d)(2). Thus, even if we presume

error in entering judgment on multiple counts of possession of a gun on educational property, defendant's current sentence is within the range of sentences authorized.

Where defendant failed to raise his constitutional double jeopardy argument before the trial court and thus failed to preserve it for our review and where—even presuming error in the judgment and remand for resentencing—the sentence currently imposed would be within the sentence range intended by our legislature and authorized by our General Statutes, we do not believe the circumstances of this case so impact defendant's substantial rights or present such an exceptional circumstance, *see Campbell*, 369 N.C. at 603, 799 S.E.2d at 602, an issue of public interest, or manifest injustice to merit the suspension of our Rules of Appellate Procedure pursuant to Rule 2. N.C.R. App. P. 2. Accordingly, we dismiss this argument.

[2] Apart from his double jeopardy argument, defendant asks whether section 14-269.2(b) permits entry of multiple convictions for the simultaneous possession of multiple guns and further contends that the State's evidence only supported entry of one conviction.

> It is well established that "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (citing *State v. Bryant*, 189 N.C. 112, 126 S.E. 107 (1925)); *see also* [*State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004)] (finding waiver of the constitutional argument that the defendant was denied a fair and impartial jury, but addressing the interrelated contention that the trial court violated its statutory duty to ensure a randomly selected jury).

State v. Davis, 364 N.C. 297, 301–02, 698 S.E.2d 65, 67–68 (2010); *see also* N.C. Gen. Stat. § 15A-1446(d)(18) (2017) (preserving for appellate review asserted errors occurring where "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law" "even though no objection, exception or motion has been made in the trial division"); *State v. Meadows*, No. 400PA17, slip. op. *7–8 (N.C. Dec. 7, 2018).

In support of his argument that the "any gun" language of General Statutes, section 14-269.2(b), only permits entry of one conviction for

possession of a gun on educational property, defendant cites *State v. Garris*, 191 N.C. App. 276, 663 S.E.2d 340 (2008). In *Garris*, the Court addressed whether the "any firearm" language of section 14-415.1 (prohibiting possession of a firearm by a felon) precluded entry of multiple convictions for possession of a firearm by a felon though several weapons were possessed simultaneously. *Id.* at 282–85, 663 S.E.2d at 346–48. At the time a matter of first impression, the Court observed that the statutory language "any firearm" was

> ambiguous in that it could be construed as referring to a single firearm or multiple firearms. If construed as any single firearm, [section 14-415.1] would allow for multiple convictions for possession if multiple firearms were possessed, even if they were possessed simultaneously. Alternatively, if construed as any group of firearms, the statute would allow for only one conviction where multiple firearms were possessed simultaneously.

Id. at 283, 663 S.E.2d at 346. Having looked to federal law, this Court wrote "[t]he United States Supreme Court holds that ambiguity in the statute should be resolved in favor of lenity, and doubt must be resolved against turning a single transaction into multiple offenses." *Id.* at 283–84, 663 S.E.2d at 347 (citing *Bell v. United States*, 349 U.S. 81, 83–84, 99 L. Ed. 905, 910–11 (1955))); *see also United States v. Dunford*, 148 F.3d 385, 389–90 (4th Cir.1998) (holding that six firearms simultaneously seized from a defendant's home only supported one conviction under 18 U.S.C. § 922(g) (prohibiting the possession of "any firearm" by a person coming within an enumerated category)). Moreover, within the jurisprudence of this State, "[i]n construing a criminal statute, the presumption is against multiple punishments in the absence of a contrary legislative intent." *Garris*, 191 N.C. App. at 284, 663 S.E.2d at 347 (citing *State v. Boykin*, 78 N.C. App. 572, 576–77, 337 S.E.2d 678, 681 (1985) (holding that N.C. Gen. Stat. § 14-72(b)(4) (larceny of a firearm) did not intend to create a separate unit of prosecution for each firearm stolen or allow multiple punishments for the theft of multiple firearms)).

As in *Garris*, we hold that the language of section 14-269.2(b) describing the offense of "knowingly . . . possess[ing] or carry[ing], whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property," N.C.G.S. § 14-269.2(b), is ambiguous as to whether multiple punishments for the simultaneous possession of multiple firearms is authorized. And consistent with this Court's application of the rule of lenity, also as applied in *Garris*, we hold that section

14-269.2(b) does not allow multiple punishments for the simultaneous possession of multiple firearms on educational property. Accordingly, we reverse and remand this matter to the trial court for resentencing of the judgments entered on the offenses of possession of a gun on educational property.

REVERSED AND REMANDED.

Judges DILLON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
RONALD T. CORBETT

No. COA18-327

Filed 19 February 2019

1. Rape—statutory—sexual act—penetration—touch between labia

There was sufficient evidence of a sexual act—penetration—for the charge of statutory rape to be submitted to the jury where the victim testified that defendant touched her "between" her labia.

2. Sexual Offenses—sexual exploitation of a minor—nude photograph—lascivious

There was sufficient evidence to submit sexual exploitation of a minor charges to the jury where defendant photographed the victim while she was naked, standing in his bedroom, and attempting to cover her private areas with her hands. A reasonable jury could conclude that the photograph was lascivious.

Appeal by defendant from judgment entered 11 May 2017 by Judge Reuben F. Young in Wake County Superior Court. Heard in the Court of Appeals 18 October 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Josephine N. Tetteh, for the State.

Mark L. Hayes, for defendant-appellant.

DAVIS, Judge.

In this appeal, we address the question of when charges of statutory rape and sexual exploitation are properly submitted to a jury. Ronald T. Corbett ("Defendant") appeals from his convictions for statutory rape of a person who is 13, 14, or 15 years old, first-degree sexual exploitation of a minor, second-degree sexual exploitation of a minor, and five counts of taking indecent liberties with a child. Because we hold that the evidence — when viewed in the light most favorable to the State — was sufficient for a reasonable juror to have found Defendant guilty of these charges, we conclude that he received a fair trial free from error.

Factual and Procedural Background

The State introduced evidence at trial tending to establish the following facts: "Amy"[1] was born in October 2001 in Toledo, Ohio to Defendant and Simone Hamilton. Amy lived with her mother and younger brother in Ohio until she was nine years old when the family moved to Raleigh. At that time, Defendant was living in Nebraska.

During the 2013-14 school year when Amy was in the sixth grade, Defendant moved to Fayetteville to live with his mother. Following Defendant's move to North Carolina, Amy began staying at his residence on weekends. During the summer of 2014, Defendant began living with Hamilton and her children in their apartment.

Within a month after moving into the apartment, Defendant became verbally and physically abusive toward Hamilton. He also sexually assaulted her on multiple occasions by forcing her to have sexual intercourse with him and to perform oral sex on him. In addition, Defendant began disciplining Amy by beating her. These punishments occurred frequently in response to "[a]nything little" such as when Amy "forgot something at school or didn't take a shower." Defendant also forced Amy to read and memorize passages from the Bible and punished her if she did not remember everything she had read.

On several occasions during 2014, Defendant took Amy into his room while Hamilton was at work and ordered her to remove her clothes. The first time this occurred, Amy initially refused to remove her clothing but ultimately acceded to Defendant's demand because she was scared he would hurt her if she refused. After taking off her clothes, Amy stood in front of Defendant for approximately an hour reading the Bible and listening to him read the Bible to her. During this incident, Defendant was

1. A pseudonym is used throughout this opinion to protect the identity of the minor child.

wearing only a towel. Although Amy did not actually observe Defendant photographing her on this occasion, she identified at trial a photograph introduced into evidence by the State showing her standing naked in her father's room that was taken on that same day.

On multiple occasions that year, Defendant took Amy into his bedroom and forced her to rub Vaseline on his penis. The first time this occurred, Amy did not understand what Defendant wanted her to do and he "kept explaining it over and over" and "ended up . . . saying it step-by-step." Defendant threatened Amy by telling her that if she did not "do this now something else will happen. I'll do something harder. I'll do something worse." He also told Amy that if she wanted a boyfriend she would "have to learn how to please him."

During one such instance, Defendant became upset with Amy because she was not "doing it correctly." He pushed her down onto his bed and got on top of her, which resulted in Vaseline getting onto Amy's pants. Defendant then ordered Amy to take her pants off and began touching her and "telling [her] to stop covering [herself]." He also tried "to put his penis inside [Amy] but [she] screamed loud and he got up because he wanted [her] to be quiet."

On another occasion, Defendant told Amy that he would return a cell phone that he had confiscated from her if she opened her legs for him. Amy was naked at the time. When she refused, he "grabbed [her] legs open" and "tried to touch [her] vagina." Although Defendant was able to touch Amy between her labia, he was unable to "get much further" because Amy continued to push his hand away.

On 27 July 2014, Defendant asked Amy to bring him lotion that he had previously purchased for her. Upon learning that Amy had left the lotion at school, Defendant became very upset. He told Amy to go to her room and began physically abusing Hamilton. Because she was upset that Defendant was hitting her mother, Amy ran out the front door and went to the apartment complex's leasing office. Defendant attempted to chase Amy but eventually gave up. Amy called the police from the leasing office, and law enforcement officers subsequently arrived at the apartment complex and arrested Defendant.

Defendant was indicted by a Wake County grand jury for statutory rape of a person who is 13, 14, or 15 years old, first-degree sexual exploitation of a minor, second-degree sexual exploitation of a minor, and five counts of taking indecent liberties with a child. On 17 September 2014, Defendant's counsel filed a motion to have him examined for the purpose of determining his capacity to stand trial. Following an examination

by the medical staff of the Forensic Services Unit of Central Regional Hospital, Defendant was found to be competent. After requesting leave to proceed *pro se* at trial, Defendant was allowed to represent himself. On 15 January 2015, an order was entered appointing standby counsel for Defendant.

A jury trial was held beginning on 8 May 2017 before the Honorable Reuben F. Young. Amy, her mother, and several law enforcement officers testified for the State. Defendant did not present any evidence. At the close of the State's evidence, Defendant's standby counsel moved to dismiss both sexual exploitation charges and the statutory rape charge based on insufficiency of the evidence. The trial court denied these motions. Defendant renewed his motions to dismiss at the close of all the evidence and the trial court once again denied them.

On 11 May 2017, the jury convicted Defendant of all charges. The trial court sentenced him to consecutive terms of 16-29 months imprisonment for each charge of taking indecent liberties, 73-148 months for the first-degree sexual exploitation charge, 25-90 months for the second-degree exploitation charge, and 240-348 months for the charge of statutory rape. Defendant gave timely notice of appeal to this Court.

Analysis

On appeal, Defendant argues that the trial court erred by denying his motions to dismiss, contending that (1) no evidence of penetration was presented to support the statutory rape charge; and (2) the photograph upon which the sexual exploitation charges were based did not depict Amy engaged in "sexual activity" as that term is defined in the North Carolina General Statutes. We address each argument in turn.

I. Statutory Rape

[1] Defendant first argues that the trial court erred by failing to dismiss the statutory rape charge because the State presented no evidence of penetration constituting a "sexual act" under N.C. Gen. Stat. § 14-27.1. We disagree.

"A trial court's denial of a defendant's motion to dismiss is reviewed *de novo*." *State v. Watkins*, 247 N.C. App. 391, 394, 785 S.E.2d 175, 177 (citation omitted), *disc. review denied*, 369 N.C. 40, 792 S.E.2d 508 (2016). On appeal, this Court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator[.]" *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

Defendant was indicted for statutory rape pursuant to N.C. Gen. Stat. § 14-27.7A(a)[2], which provides that a defendant "is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person[.]" N.C. Gen. Stat. § 14-27.7A(a) (2014). For purposes of N.C. Gen. Stat. § 14-27.7A(a), the term " '[s]exual act' means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body[.]" N.C. Gen. Stat. § 14-27.1 (2014). Our appellate courts have held that for purposes of rape offenses, "evidence that the defendant entered the labia is sufficient to prove the element of penetration." *State v. Bellamy*, 172 N.C. App. 649, 658, 617 S.E.2d 81, 88 (2005) (citation omitted), *appeal dismissed and disc. review denied*, 360 N.C. 290, 628 S.E.2d 384 (2006).

In *Bellamy*, the defendant was convicted of first-degree sexual offense. *Id.* at 657, 617 S.E.2d at 88. At trial, evidence was presented that the defendant "used the barrel of his gun to separate [the victim's] labia." *Id.* During her testimony, the victim "clarified that she felt the barrel of the gun on the *inside* of her labia." *Id.* On appeal, the defendant argued that insufficient evidence of penetration was presented to support the submission of the first-degree sexual offense charge to the jury. This Court held that the trial court properly denied the defendant's motion to dismiss where "all of the evidence . . . shows that Bellamy used the barrel of his gun to spread the labia of [the victim]." *Id.* at 658, 617 S.E.2d at 88.

In the present case, the following exchange occurred at trial between the prosecutor and Amy on direct examination:

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2. N.C. Gen. Stat. § 14-27.7A(a) was recodified as N.C. Gen. Stat. § 14-27.25 on 1 December 2015. Because the offense in the present case occurred prior to 1 December 2015, however, N.C. Gen. Stat. § 14-27.7A(a) remains applicable in this case.

[PROSECUTOR]: And can you tell us the areas that [Defendant] would touch you?

[AMY]: My vaginal area.

. . . .

[PROSECUTOR]: And so what did he physically do?

[AMY]: He, like, grabbed my legs open.

[PROSECUTOR]: And what did he do?

[AMY]: He tried to touch my vagina.

[PROSECUTOR]: Do you recall what you were wearing?

[AMY]: I think I was wearing no clothes.

[PROSECUTOR]: And what was he able to touch?

[AMY]: Just the outside and he tried to get in, but I kept hitting him.

[PROSECUTOR]: I hate to talk about anatomy, but you sort of have the outside labia part, was he able to touch the skin there?

[AMY]: Yes.

[PROSECUTOR] And how would you [be] able to get him away?

[AMY]: He's stronger than me. Just, he eventually stopped because I guess he got tired.

. . . .

[PROSECUTOR]: *How far would you say he was able to get with -- did he actually go between your labia? Do you understand my question?*

[AMY]: *Yes.*

[PROSECUTOR]: *Was he able to do that?*

[AMY]: *Yes.*

(Emphasis added.)

Citing *Bellamy*, Defendant contends that Amy's testimony that he touched her "between" her labia does not constitute sufficient evidence

of penetration. This is so, he asserts, because " 'between' the labia does not equate to 'inside' the labia" for purposes of penetration pursuant to N.C. Gen. Stat. § 14-27.7A. We disagree.

In the above-quoted exchange, Amy testified that Defendant touched her in her "vaginal area." She stated that he "grabbed [her] legs open" and "tried to touch [her] vagina[.]" In addition, she expressly testified that Defendant *was* able to touch her "between" her labia before giving up after Amy repeatedly pushed him away.

Viewing Amy's testimony in the light most favorable to the State — as we must — we are satisfied that reasonable jurors could have concluded that the State presented sufficient evidence that Defendant penetrated Amy's labia. Therefore, we hold that the trial court properly denied Defendant's motion to dismiss the statutory rape charge. *See State v. Kitchengs*, 183 N.C. App. 369, 376, 645 S.E.2d 166, 171-72 ("[W]e cannot conclude . . . that the State failed to meet its burden of showing substantial evidence of penetration. Thus, the trial court did not err in denying Defendant's motions to dismiss [his statutory rape charge]."), *disc. review denied*, 361 N.C. 572, 651 S.E.2d 370 (2007).

II. Sexual Exploitation

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the first-degree and second-degree sexual exploitation charges because the photograph submitted into evidence by the State that formed the basis for those charges did not depict Amy engaged in "sexual activity" as defined by the North Carolina General Statutes. Specifically, he contends that (1) the photograph was not "lascivious"; and (2) it did not include the exhibition of Amy's genitals or pubic area.

N.C. Gen. Stat. § 14-190.16 provides, in pertinent part, as follows:

> A person commits the offense of first degree sexual exploitation of a minor if, knowing the character or content of the material or performance, he . . . [u]ses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in *sexual activity* for a live performance or for the purpose of producing material that contains a visual representation depicting this activity[.]

N.C. Gen. Stat. § 14-190.16(a) (2017) (emphasis added).

Second-degree sexual exploitation of a minor criminalizes, among other things, the act of "photograph[ing] . . . or duplicat[ing] material that contains a visual representation of a minor engaged in sexual activity[.]"

N.C. Gen. Stat. § 14-190.17 (2017). The definition of "sexual activity" for purposes of both first-degree and second-degree sexual exploitation of a minor includes "[t]he lascivious exhibition of the genitals or pubic area[.]" N.C. Gen. Stat. § 14-190.13(g) (2017). This prong of the definition of "sexual activity" was the theory on which the State proceeded at trial for purposes of the sexual exploitation charges.

Our appellate courts have defined the term "lascivious" as "tending to arouse sexual desire." *State v. Hammett*, 182 N.C. App. 316, 322, 642 S.E.2d 454, 458 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 361 N.C. 572, 651 S.E.2d 227 (2007). In *Hammett*, the defendant was convicted of taking indecent liberties with a child pursuant to N.C. Gen. Stat. § 14-202.1 for conduct that included "french kissing" his minor daughter. *Id.* at 323, 642 S.E.2d at 458. This Court concluded that the defendant's actions were lascivious for purposes of the statute because "the jury could find that defendant's actions . . . tended to arouse sexual desire in defendant." *Id.* at 322-23, 642 S.E.2d at 459.

Here, the photograph forming the basis for Defendant's convictions for sexual exploitation of a minor depicts Amy standing naked in her father's bedroom except for her socks. Her arms are crossed in front of her body, and she is attempting to cover her pubic area with her hands.

A reasonable jury could have found that this photograph meets the definition of "lascivious." The focal point of the picture is Amy's naked body. She is standing in her father's bedroom, a setting generally associated with sexual activity. She is fully nude except for her socks. Furthermore, the photograph is clearly intended to elicit a sexual response based upon the context in which it was taken, which included Defendant's repeated attempts to touch Amy sexually.

Finally, we address Defendant's contention that the photograph does not actually contain an exhibition of Amy's genitals or pubic area. He argues that "[w]hile Amy is unclothed, her arms are crossed in front of her body and her hands block any view of her genital area."

Although it is true that Amy's hands are positioned over her genitalia in the photograph, the fingers of her left hand are spread far enough apart that clearly visible gaps exist between them such that her pubic area is at least partially visible. Viewing the evidence in the light most favorable to the State, reasonable jurors could have determined that the photograph at issue depicted Amy's pubic area.

Therefore, we hold that the trial court properly denied Defendant's motion to dismiss the sexual exploitation charges. *See State v. Riffe*, 191

N.C. App. 86, 96, 661 S.E.2d 899, 906 (2008) (trial court did not err in denying defendant's motion to dismiss sexual exploitation of a minor charges where State presented substantial evidence to support those charges).

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges HUNTER, JR. and MURPHY concur.

STATE OF NORTH CAROLINA
v.
PETER DANE KOKE

No. COA18-662

Filed 19 February 2019

1. Evidence—insurance fraud—vehicle reported stolen—evidence regarding submerged truck—prejudice analysis

In a prosecution for insurance fraud and obtaining property by false pretenses, defendant was not prejudiced by the trial court's admission of evidence concerning a truck recovered from a river after defendant reported it stolen, even though the evidence should not have been admitted since it did not have a tendency to make any fact of the charged insurance fraud any more or less probable. There was sufficient other evidence supporting the jury's conviction for fraud (based on defendant's failure to disclose during the insurance investigation that major repairs had been done to the truck).

2. False Pretense—jury instruction—specificity regarding false representation—conformity with indictment

In a prosecution for obtaining property by false pretenses and insurance fraud, the jury instruction on false pretense was not so vague as to be erroneous, and there was no fatal variance between the indictment, the evidence produced at trial, and the jury instructions. Further, the trial court gave the jury a limiting instruction that evidence regarding a submerged truck could be considered only for the purpose of showing the element of intent for the insurance fraud charge.

3. Fraud—insurance—jury instruction—specificity regarding misrepresentation

In a prosecution for obtaining property by false pretenses and insurance fraud, the jury instruction on insurance fraud was not so vague as to be erroneous, and there was no fatal variance between the indictment, the evidence produced at trial, and the jury instructions. The only evidence of a written misrepresentation by defendant was the affidavit he submitted as part of his insurance claim after he reported his truck stolen, in which he failed to disclose that major repairs had been done to the truck.

Appeal by defendant from judgments entered 9 February 2018 by Judge Joshua W. Willey Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 17 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Brent D. Kiziah, for the State.

Edward Eldred for defendant-appellant.

TYSON, Judge.

Peter Dane Koke ("Defendant") appeals from judgments entered after a jury found him guilty of obtaining property by false pretenses and insurance fraud. We find no plain error.

I. Background

Defendant obtained a personal automobile insurance policy for a Jeep Patriot Sport vehicle from National General Insurance through AAC Insurance Agency on 1 August 2014. Twelve days later, Defendant bought a new black Dodge Ram pick-up truck ("Ram"), and traded in the Jeep. Sometime after purchasing the truck, Defendant removed the Jeep from coverage under his insurance policy and added coverage for the Ram. The insurance policy was renewed for the Ram on 1 February 2015 for a six-month term. The policy was cancelled on 19 May 2015 for non-payment.

While uninsured, the Ram was involved in an accident on 3 July 2015. Defendant was not driving the Ram at the time of the accident, but was following behind in another vehicle. The driver of the Ram was found to be at fault. The responding officer estimated the damage to the Ram to be $9,000, and rated the damage to be a "4" on a scale from 1 to 7.

The officer observed the front of the Ram to be "pushed in" and opined it was not "roadworthy."

Defendant hired a self-employed mechanic, Archer Brawner, to repair the front end of the truck. Defendant procured replacement parts for the truck and agreed to pay Brawner $500 to make the repairs, which Defendant did not pay. At trial, Brawner was unsure of all the parts he had replaced. He consistently stated he had replaced the hood and the driver's side fender, but could not recall if he had replaced the grill or any other damaged parts. Brawner described the damage to the Ram as "cosmetic," but testified he did not know whether the truck was functional. Brawner did not provide Defendant with an invoice detailing the repairs, nor did he take any pictures or make notes about the extent of the damage.

On 7 August 2015, Defendant applied for a commercial automobile insurance policy for coverage on the Ram. The application included various questions, including a question inquiring whether "the applicant or any listed driver [had] been convicted, plead guilty, nolo contendere, or no contest to any felony other than alcohol-related driving offenses during the last 10 years." A felony conviction would preclude issuance of a commercial insurance policy, per company regulations.

The insurance agent presented Defendant with a pre-filled application, which answered the above question, and all other questions, as "no." Defendant reviewed and signed the application. Defendant had pled guilty to a felony offense of obtaining property by false pretenses on 1 April 2006.

Defendant was issued a commercial automobile insurance policy, which valued the Ram at $22,500. The policy provided for comprehensive insurance, which included coverage for theft.

Five days after securing coverage, on 12 August 2015, Defendant reported the Ram had been stolen. National General Insurance sent Defendant an affidavit to complete, sign, and have notarized. Defendant filled in most of the requested information but left some spaces blank, including one inquiring about "major repairs since purchase."

Defendant did not disclose the prior accident on 3 July 2015 to National General, but it was discovered by the company during the course of its investigation of the theft. Once confronted about the previous accident, Defendant disclosed the repairs completed by Brawner. Defendant did not provide any documentation concerning the repairs or the parts used.

North Carolina Department of Insurance investigator Tyler Braswell was contacted by the Wilmington Police Department in September 2015, to assist with locating the Ram. After the investigation was completed, National General reviewed Defendant's claim, conducted a manager's "round table review," and concluded the company did not have evidence to refute the claim that the truck had been stolen.

National General issued two checks to Defendant, each for $11,000, on 2 October and 8 October 2015. National General attempted to stop payment on both checks after they had been mailed, as its underwriting department had determined Defendant's omission to disclose his prior felony conviction required the insurance policy to be rescinded. National General was able to stop payment on the check issued 8 October, but Defendant had already cashed the previous check.

After a year with no sightings of the Ram, Braswell requested the help of the Wilmington Police Department to use sonar to search for the truck in the Cape Fear River on 16 September 2016. They specifically looked in the area near the bridge where Defendant was known to keep vehicles and where the repairs to the Ram had been made. The sonar indicated something under the water near the bridge that appeared to be a vehicle. This was confirmed when Braswell and the officer were assisted by surveyors who were also present on the river that day. Braswell testified that what he saw on the surveyors' imaging equipment "looked consistent with the make and model of a Dodge Ram."

Braswell contacted the Wilmington Fire Department dive team for assistance. The dive team went out to the river on 21 September 2016. The divers confirmed it was a submerged truck and recovered a Dodge Ram emblem from the tailgate and a side mirror.

The river provided extremely low visibility. The testifying firefighter indicated, based upon touch, the truck did not display a license plate. He also had felt there was damage on the front end of the truck, including "large gaps and missing areas." Braswell tried to find assistance to tow the truck out of the water, but was unsuccessful. In May 2017, Braswell discovered the Ram had already been towed out of the river at Defendant's request.

James Haight, of Ace Wrecker Service, Inc., testified Defendant had employed him to remove a truck out of the river on 1 October 2016. Haight identified the truck as a "very dark blue" Dodge, covered with barnacles, and appeared to have "been down there awhile." No license plate or VIN number from the recovered vehicle was identified or noted. Haight towed the truck about half a block away from the boat ramp,

and left it in a locked, fenced-in area. Haight took photographs of the truck he towed out of the river, but the copies included in the record on appeal are not discernable. Defendant's reportedly missing truck was never recovered by investigators.

Braswell took out an arrest warrant for Defendant on 16 October 2015. Defendant was indicted on one count of obtaining property by false pretenses and one count of insurance fraud.

At trial, Defendant made a motion to exclude all evidence related to the truck found in the river. The trial court agreed in part and allowed the evidence only for the limited purpose of proof of Defendant's intent to commit insurance fraud. Limiting instructions were given to the jury at the time the evidence was presented and in the final jury instruction.

The jury found Defendant guilty of obtaining property by false pretenses and of insurance fraud. Defendant was sentenced within the presumptive range of 11 to 23 months for obtaining property by false pretenses. This sentence was suspended, and Defendant was placed on 36 months of probation, which required Defendant to serve 42 days in jail. Defendant was sentenced within the presumptive range of 11 to 23 months for insurance fraud, which was also suspended for 36 months of probation to be served at the conclusion of the first sentence. Defendant was required to pay $11,000 in restitution. Defendant appealed.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444 (2017).

III. Issues

Defendant asserts the trial court committed plain error by: (1) admitting the evidence concerning the truck recovered from the Cape Fear River; (2) failing to instruct the jury that he was guilty of insurance fraud only if he failed to report major repairs; and, (3) failing to instruct the jury that he was guilty of obtaining property by false pretenses only if he represented he had no prior felonies.

IV. Evidence of Sunken Truck

[1] Defendant argues the evidence concerning the truck found in the river was not relevant to the charged offenses. He asserts it was prejudicial error for the trial court to allow the evidence.

A. Standard of Review

At trial, Defendant made a motion *in limine* to exclude all the evidence related to the truck found in and removed from the river. The trial court excluded all such evidence for the charge of obtaining property by false pretenses due to lack of relevance, but concluded the evidence was relevant to the alleged insurance fraud. Four witnesses testified concerning the sunken truck: the surveyor whose sonar identified what appeared to be a Dodge Ram submerged in the river; the firefighter-diver who recovered the Ram emblem and the side-view mirror from the submerged truck; Haight, the tow truck operator who pulled the truck from the river; and Investigator Braswell.

In order to preserve an issue for appeal, a defendant must have made a timely motion or objection to the trial court. N.C. R. App. P 10(a)(1). Our appellate courts have consistently held that "[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." *State v. Tutt*, 171 N.C. App. 518, 520, 615 S.E.2d 688, 690 (2005) (alteration in original; citations and internal quotation marks omitted).

Defendant failed to object prior to the testimony of the surveyor or the introduction of the two images from his sonar, which the surveyor identified as a Dodge Ram. Defendant objected after the images were admitted and requested a limiting instruction. Defendant did not object to the testimony of the firefighter-diver, but requested the limiting instruction after his pre-dive checklist was admitted. The trial court gave the limiting instruction prior to Haight's testimony. Defendant failed to object to Investigator Braswell's testimony related to the submerged truck.

Defendant acknowledges that his failure to object to the proffered testimony has waived appellate review for preserved error. *See State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979) ("It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character.").

The State argues this Court is barred from reviewing Defendant's claim under plain error review, and asserts our appellate courts have refused to apply plain error review to matters within the trial court's discretion. *See State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000). The State accurately asserts a trial court's decision to admit "relevant but prejudicial evidence under Rule 403 is a matter left to the sound

discretion of the trial court." *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). However, whether the evidence admitted is relevant or not is a question of law, which this Court reviews *de novo*. *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010). We review this issue for plain error.

Where a defendant fails to preserve errors at trial, this Court reviews any alleged errors under plain error review. *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012).

> The plain error rule "is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record," the error is found to have been "so basic, so prejudicial, so lacking in its elements that justice cannot have been done" or that it had "a probable impact on the jury's finding that the defendant was guilty."

State v. Theer, 181 N.C. App. 349, 363, 639 S.E.2d 655, 665 (2007) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

B. Relevancy

Defendant argues the evidence related to the sunken truck was irrelevant to the alleged insurance fraud. The trial court denied admission of the evidence for obtaining property by false pretenses, but allowed the evidence of the sunken truck for the purpose of proving Defendant's intent to commit insurance fraud.

The elements of insurance fraud are: (1) a defendant presents a statement for a claim under an insurance policy; (2) that statement contained false or misleading information; (3) the defendant knows the statement is false or misleading; and, (4) the defendant acted with the intent to defraud. N.C. Gen. Stat. § 58-2-161(b); *State v. Payne*, 149 N.C. App. 421, 426-27, 561 S.E.2d 507, 511 (2002).

The alleged false statement made by Defendant was his failure "to disclose on the affidavit of vehicle theft from National General Insurance that his vehicle had major repairs since it was purchased." At trial, the State's asserted theory was the towing of the truck from the river indicated Defendant's intent to defraud, as his charged crimes were "crimes of deceit." The State argued that not allowing the evidence about the submerged truck to be admitted would be "in effect punishing the State" for Defendant's removal of the truck.

The State now asserts on appeal a new theory that the evidence of the submerged vehicle falls under the "chain of circumstances"

rationale, which allows for the admission of evidence "if it forms part of the history of the event or serves to enhance the natural development of the facts." *State v. Agee*, 326 N.C. 542, 547-48, 391 S.E.2d 171, 174 (1990) (citations and internal quotations omitted).

The State concedes no direct evidence tends to show Defendant or someone directed by Defendant drove or placed his allegedly stolen Ram into the Cape Fear River. A Dodge Ram was located in the river near property Defendant was known to have used. Divers pulled off an emblem and a side-view mirror, but did not find a license plate or look for a VIN plate or other identification. A "very dark blue" Ram was towed out of the river at Defendant's request, while his purportedly stolen Ram was noted to be black. The diver and tow truck driver who removed the truck both indicated the truck in the river had damage to the front area, including a missing grill.

Defendant was charged with insurance fraud for failure to report major repairs to the Ram, and the State presented evidence of damage to the submerged truck. The State's use of the evidence of the submerged truck is not within a "chain of circumstances," but is more like a logical fallacy. As defense counsel argued at trial, the State cannot have it both ways: "They can't say [they have] a statement where he denies making any repairs, but [the State has evidence of] a truck where no repairs [have] been made, therefore that must be his truck."

The evidence of the submerged truck does not have a tendency to make any fact of the charged insurance fraud of failing to disclose major repairs more or less probable. N.C. Gen. Stat. § 8C-1, Rule 401. The trial court erred in admitting that evidence.

C. Prejudice

Because of Defendant's failure to preserve error at trial, his burden to prove the error was prejudicial is heavier. *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333. This requires an examination of the entire record to determine whether "the error had a probable impact on the jury finding Defendant guilty." *Id.* at 518, 723 S.E.2d at 334.

Defendant has failed to meet or carry his burden on appeal. Sufficient evidence exists in the record to support a jury's finding of guilty for insurance fraud for Defendant's failure to disclose major repairs on the Ram. The Ram was involved in an accident, where the responding officer estimated the damages to the Ram to be $9,000, and opined the truck did not appear "roadworthy." Further, Brawner's testimony supports a finding that the repairs he performed on the Ram were "major." He testified to

replacing at least the hood and one fender, and possibly other damaged areas. Brawner's testimony that the repairs were "cosmetic," and that he was only to be paid $500 for his labor, are not determinative of whether the repairs he performed were "major," and were issues for the jury to determine together with the properly admitted evidence.

After review of the entire record, we hold sufficient evidence supports the jury's conviction of Defendant for the charged offense. Defendant has failed to demonstrate the limited testimony of the submerged truck had a probable impact on the jury's verdict. *State v. Perkins*, 154 N.C. App. 148, 153, 571 S.E.2d 645, 648-49 (2002). Defendant has failed to show the trial court committed plain error in admitting the evidence of the submerged truck to award a new trial. *See id.*

V. Jury Instructions

Defendant argues the trial court erred by providing jury instructions that allowed the jury to convict him on a theory not alleged in the indictment. We find no error concerning the given instructions.

A. Standard of Review

Because Defendant failed to object at trial and preserve error, we review this issue for plain error. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. "In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998).

B. False Pretenses

[2] The trial court, using the pattern jury instructions, instructed the jury that in order to find Defendant guilty of obtaining property by false pretenses the State must have proved:

> First, that the defendant made a representation to another; second, that this representation was false; third, that this representation was calculated and intended to deceive. Fourth, that the victim was in fact deceived by this representation; and fifth, that the defendant thereby obtained or attempted to obtain property from the victim.

Defendant argues the lack of specificity in the instructions would allow the jury to convict him if they found any false representation. We disagree.

"A jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds no fatal variance between the indictment, the proof presented at trial, and the instructions to the jury." *State v. Ledwell*, 171 N.C. App. 314, 320, 614 S.E.2d 562, 566 (2005) (citation and internal quotation marks omitted).

Defendant's indictment alleged he had obtained property by false pretenses by failing to disclose on his application for insurance that he had previously pled guilty to a felony offense. At trial, Defendant stipulated that he pled guilty to a felony offense on 1 April 2006. Just prior to providing the pattern jury instruction above, the trial court reminded the jury of the stipulated fact of Defendant's previous guilty plea, instructing the jury "to take these facts as true for the purposes of this case."

Further, after a summation of the evidence concerning the submerged truck, the trial court provided the limiting instruction:

> You may not consider this evidence in your deliberations under the false pretenses charge. You may consider this evidence in your deliberations on the insurance fraud charge. This evidence is received *solely for the purpose of showing that the defendant had the intent, which is a necessary element of the crime of insurance fraud* as charged in the indictment. If you believe this evidence, you may consider it, but only for the limited purpose for which it was received. *You may not consider it for any other purpose.* (Emphasis supplied).

Our appellate courts have "repeatedly held that jurors are presumed to pay close attention to the particular language of the judge's instructions in a criminal case and that they undertake to understand, comprehend, and follow the instructions as given." *State v. Trull*, 349 N.C. 428, 455, 509 S.E.2d 178, 196 (1998).

Defendant has failed to show a fatal variance between the indictment, the proof presented at trial, and the jury instructions. We find no error in the trial court's instructions on the charge of obtaining property by false pretenses. Defendant's argument is overruled.

C. Insurance Fraud

[3] The provided instruction for insurance fraud required the State to prove:

> First, that an insurance policy existed between Peter Dane Koke and National General Insurance Company;

> second, that the defendant presented a written statement in support of a claim for payment pursuant to that insurance policy; third, that the statement contained false or misleading information concerning a fact or matter material to the Claim. Fourth, that the defendant knew the statement contained false or misleading information concerning a fact or matter material to the claim; and fifth, that the defendant acted with the intent to defraud National General Insurance Company.

This Court has found plain error "[w]here there is evidence of various misrepresentations which the jury could have considered in reaching a verdict" and the trial court fails to instruct on the specific misrepresentation. *State v. Locklear*, __ N.C. App. __, __, 816 S.E.2d 197, 206 (2018). Here, the only evidence of a written statement that contained false or misleading information was Defendant's theft affidavit where he failed to disclose major repairs to the Ram.

Analogous to the analysis above, no fatal variance exists between the indictment, the evidence presented at trial, and the jury instructions. *Ledwell*, 171 N.C. App. at 320, 614 S.E.2d at 566. We find no error in the trial court's instructions on the charge of insurance fraud. Defendant's argument is overruled.

VI. Conclusion

The trial court correctly limited the admissions of the evidence of the submerged truck on the obtaining property by false pretenses charge and correctly instructed the jury not to consider it for that purpose. The evidence of the submerged truck was irrelevant to Defendant's alleged misleading statement as charged. Admission of such irrelevant, but limited, evidence was error. After review of the entire record for plain error, we conclude Defendant has failed to show prejudice or that this error had a probable impact on the jury's verdict to rise to the level of plain error in light of properly admitted evidence. *Perkins*, 154 N.C. App. at 153, 571 S.E.2d at 648-49.

We find no error in the trial court's instructions to the jury. Defendant's arguments are overruled. *It is so ordered.*

NO PLAIN ERROR.

Judges ZACHARY and COLLINS concur.

STATE OF NORTH CAROLINA
v.
TOUSSANT LOVERTURE PARKS, DEFENDANT

No. COA18-422

Filed 19 February 2019

1. Assault—with a deadly weapon—jury instructions—self-defense

The trial court erred by denying defendant's request to instruct the jury on the use of deadly force in self-defense where, in the light most favorable to defendant, there was evidence supporting the instruction. Even though the State presented conflicting evidence, there was testimony that defendant was attacked outside of a restaurant without provocation, defendant was backing away with his hands raised, and numerous people described as a riot were kicking and hitting him. The error was prejudicial because it prevented the jury from considering whether defendant reasonably believed deadly force was necessary to prevent imminent death or great bodily harm to him.

2. Criminal Law—jury instructions—flight—as evidence of guilt—running after altercation

The trial court did not err by instructing the jury that it could consider defendant's alleged flight as evidence of guilt where there was evidence that defendant "took off running" after an altercation in a restaurant parking lot.

Appeal by Defendant from judgment entered 27 October 2017 by Judge Reuben F. Young in Wake County Superior Court. Heard in the Court of Appeals 28 November 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Donna B. Wojcik, for the State.

Joseph P. Lattimore, for defendant-appellant.

MURPHY, Judge.

A trial court must instruct a jury on self-defense where, taking the evidence in the light most favorable to the defendant as true, there is competent evidence to support such an instruction. Failure to do so

is error, even if the State presents conflicting evidence. Additionally, a trial court does not err in instructing the jury on flight evidence where there is some evidence to reasonably support the theory that the defendant fled after commission of the crime charged. Here, there was evidence to support both a self-defense instruction and a flight instruction. The trial court committed prejudicial error by failing to instruct the jury on self-defense, thus entitling Defendant to a new trial.

BACKGROUND

On 2 April 2017, Aubrey Chapman ("Chapman") attended the birthday party of his cousin, Timothy Sims ("Sims"), at Red Bowl Asian Bistro in Raleigh. Also in attendance at the party was Chapman's childhood friend, Alan McGill ("McGill"). While McGill was ordering a drink from the restaurant's bar and talking to a female attendee, Defendant approached him. Defendant asked McGill, "How do you know her? Where do you know her from?" McGill responded that he did not want any trouble. At this time, Defendant hit McGill in the face with a closed fist. Chapman observed this sudden confrontation and struck Defendant in the face. Security escorted Defendant out of the restaurant. Chapman followed shortly thereafter, stating, "This guy is ruining this party for everybody." A group of people "stampeded out" of the restaurant behind Chapman.

The sequence of events after Defendant, Chapman, and the group of attendees exited the restaurant conflicts. Chapman stated that when he exited the restaurant, Defendant immediately "came charging up" to him with an orange box cutter in his hand. As Defendant approached him with the box cutter, Chapman stated that he started "swinging" at Defendant. At this time, Chapman recalled the crowd grew and intervened. Chapman then stated that Defendant came charging at him again with the box cutter and cut him below his left kidney as Chapman tripped over a curb. Sims also recalled a male rushing towards Chapman outside of the restaurant. One of the security guards working the event also observed Defendant charge towards Chapman twice and cut Chapman on his back. Another security guard stated that [Chapman's] "friends had realized that [Defendant] had a box cutter, and [tried] to basically fight him and beat him up." Amidst the altercation between Defendant and the group, Reggie Penny ("Penny"), a security guard, was also cut "on his front half and his back."

Penny, the injured security guard, and Sherrel Outlaw ("Outlaw"), an attendee, however, recalled a different sequence of events outside of the restaurant. Penny stated that he observed Defendant trying to

reenter the restaurant after being escorted out. As he was speaking with Defendant, Penny recalled "two people rushing up to [Defendant]" on both sides to start an altercation with Defendant. Amidst the altercation, Penny observed the group "kicking and stomping." Outlaw stated that she went outside after hearing "commotion" inside the restaurant. She then saw Defendant with "his hands up" when "a group of guys [started] walking towards him . . . ." At this time, Defendant "took a couple of steps back and then there was a guy on the left side of him that hit him in the face, and then there was a guy like probably two steps to the right of [Defendant], and once he got hit, the guy on the right side swung." Outlaw stated, "that is when the group of guys started jumping on him and I seen [sic] them go down." Outlaw stated that she did not see Defendant with a weapon.

Defendant was indicted on two counts of Assault with a Deadly Weapon Inflicting Serious Injury. At trial, Defendant requested a jury instruction on self-defense using N.C.P.I. – Crim. 308.45. The trial court denied this request, stating, "I don't believe that there is evidence that has been presented that supports a self defense claim." The trial court also overruled Defendant's objection to instructing the jury on flight. A jury convicted Defendant for Assault with a Deadly Weapon for the injuries sustained by Penny and Assault with a Deadly Weapon Inflicting Serious Injury for those sustained by Chapman. Defendant was sentenced to an active term of 29 to 47 months.

ANALYSIS

A. Standard of Review

We review a challenge to the trial court's decision regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted). Defendant preserved his arguments regarding jury instructions for appeal. Accordingly, he must demonstrate that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2017).

B. Self-Defense Instruction

[1] Defendant first contends the trial court erred in failing to instruct the jury on the use of deadly force in self-defense. We agree.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "When supported by competent evidence, self-defense unquestionably becomes a substantial and essential feature of a criminal case . . . ." *State v. Deck*, 285 N.C. 209, 215, 203 S.E.2d 830, 834 (1974). For this reason, a defendant is entitled to an instruction on self-defense when he or she presents competent evidence of such. *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986). In determining whether a defendant has presented competent evidence sufficient to support an instruction for self-defense, we take the defendant's evidence as true and consider it in the light most favorable to the defendant. *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010). Once this showing of competent evidence is made, "the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence." *State v. Anderson*, 40 N.C. App. 318, 321, 253 S.E.2d 48, 50 (1979) (quoting *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974)).

N.C.G.S. § 14-51.3 provides:

> (a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:
>
> > (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
> >
> > (2) Under the circumstances permitted pursuant to G.S. 14-51.2

N.C.G.S. § 14-51.3(a) (2017). However, subject to certain exceptions, our law does not permit a defendant to receive "the benefit of self-defense if he was the aggressor" or initially provokes the use of force against himself or herself. *State v. Lee*, ___ N.C. App. ___, ___, 811 S.E.2d 233, 236 (2018); N.C.G.S. § 14-51.4(2) (2017). "An individual is the aggressor if he or she aggressively and willingly enters into a fight without legal excuse or provocation." *Lee*, ___ N.C. App. at ___, 811 S.E.2d at 236. Moreover, the limited circumstances under which an initial aggressor may regain his or her right to use defensive force under N.C.G.S.

§ 14-51.4 are unavailable to a defendant who used deadly force in his or her initial aggression. *State v. Holloman*, 369 N.C. 615, 628-29, 799 S.E.2d 824, 833 (2017).

Here, Defendant does not dispute the trial court's finding that the box cutter is a deadly weapon as a matter of law. Thus, we analyze the use of the box cutter in self-defense as the use of deadly force. Accordingly, our inquiry is into whether Defendant presented competent evidence that he "reasonably believe[d] that such force [was] necessary to prevent imminent death or great bodily harm to himself" so as to warrant an instruction on self-defense.[1] N.C.G.S. § 14-51.3(a)(1).

At trial, Defendant's counsel asked Penny, "As you were talking to [Defendant], the man who was hosting the party and his buddy came up and rushed around you and attacked [Defendant]?" Penny replied, "Yes." More explicitly, Penny testified that "[t]hey attacked him." Penny further stated that he did not see any weapon in Defendant's hand at that time. Outlaw, another attendee of the party, similarly testified that she did not see a weapon in Defendant's hand and that she observed the group of people attack Defendant while he was backing up with his hands raised. When the group attacked Defendant, Outlaw described it as a "riot," with multiple people hitting and kicking Defendant. Outlaw even testified that she believed Defendant would die in the attack "because there was [sic] so many of them." Taken as true and in the light most favorable to Defendant, this evidence is sufficient to support Defendant's proposition that the assault on him gave rise to his reasonable apprehension of death or great bodily harm. *See State v. Whetstone*, 212 N.C. App. 551, 560, 711 S.E.2d 778, 784-85 (2011) (finding sufficient evidence to support the proposition that an assault on the defendant gave rise to his reasonable apprehension of death or great bodily harm when the defendant was knocked to the ground, held there, and choked). As such, the trial court erred in failing to instruct the jury on the use of self-defense.

The State contends that there is no evidence from which self-defense may be inferred, arguing that all of the evidence indicates that Defendant was the initial aggressor, thus depriving him of a self-defense instruction. The State is correct in its recitation of some of the evidence presented showing that Defendant *was* the initial aggressor of the altercation outside of the restaurant when he twice charged at Chapman with a box cutter; however, the State omits the conflicting evidence

1. N.C.G.S. § 14-51.3(a)(2) is inapplicable, as the circumstances permitted under N.C.G.S. § 14-51.2 are inapplicable to this case.

from Penny and Outlaw indicating that Defendant had not brandished a weapon and was attacked without provocation when attendees flanked and attacked him on both sides. The credibility of such evidence does not factor into our analysis, as we must view the evidence in the light most favorable to Defendant and take such evidence as true. We have "held that when a defendant's evidence tended to show he acted in self-defense, 'the trial judge was obligated to instruct on self-defense but because the State's evidence tended to show that defendant was the aggressor, he properly instructed further that self-defense would be an excuse only if defendant was not the aggressor." *Lee*, ___ N.C. App. at ____, 811 S.E.2d at 237 (quoting *State v. Joyner*, 54 N.C. App. 129, 135, 282 S.E.2d 520, 524 (1981)). With conflicting evidence, it was for the jury to determine which individual was the initial aggressor.

Having concluded the trial court erred in failing to instruct the jury on self-defense, we must next determine whether Defendant has met his burden of showing a reasonable possibility that, had this error not been committed, a different result would have been reached. The State contends that no such reasonable possibility exists, as "Defendant only put on one witness, Ms. Outlaw" and "[h]er testimony was not credible." However, the determination of the credibility of witness testimony rests firmly with the jury. The trial court's erroneous denial of Defendant's request for a self-defense instruction prevented the jury from considering whether Defendant reasonably believed that deadly force was necessary to prevent imminent death or great bodily harm to himself. *See State v. Ramos*, 363 N.C. 352, 356, 678 S.E.2d 224, 227 (2009) ("Evaluating the credibility of defendant's testimony in light of the other evidence was properly for the jury and the trial court's instructional error prevented the jury from considering the willfulness of defendant's actions.") Based on the testimony of Penny and Outlaw, the trial court's error was prejudicial, as there is a reasonable possibility that the jury could have found that Defendant reasonably believed deadly force to be necessary.

C. Flight Instruction

[2] Defendant also contends that the trial court erred in instructing the jury that it could consider Defendant's alleged flight as evidence of guilt. We disagree.

"A trial court may properly instruct on flight where there is some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged." *State v. Lloyd*, 354 N.C. 76, 119, 552 S.E.2d 596, 625 (2001) (citation and internal quotation marks omitted). "Mere evidence that defendant left the scene of

the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991). However, "[t]he fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977).

The probative value of flight evidence has been "consistently doubted" in our legal system, and we note at the outset that we similarly doubt the probative value of Defendant's alleged flight here. *See Wong Sun v. U.S.*, 371 U.S. 471, 483 n. 10, 83 S.Ct. 407, 415 n. 10, 9 L.Ed.2d 441 (1963). However, there is "some evidence in the record" that "reasonably support[s] the theory that the defendant fled after the commission of the crime charged." *See Lloyd*, 354 N.C. at 119, 552 S.E.2d at 625. Sims reported to a responding officer that after Penny was injured, Defendant "took off running[,]" and "the other bouncers chased after [Defendant] and tackled him to the ground." Moreover, Officer Michael Curci testified that Defendant "had run in this direction so [the] victims were to my left and the suspect was to my right." Such evidence reasonably supports the theory that Defendant not only left the scene of the altercation, but also took steps to avoid apprehension. The trial court did not err in instructing the jury on flight.

CONCLUSION

Although the evidence of self-defense presented at trial was conflicting, taking the evidence in the light most favorable to Defendant as true, there was competent evidence sufficient to support a self-defense instruction. This error was prejudicial. The trial court, however, did not err in instructing the jury on flight. Defendant is entitled to a new trial.

NEW TRIAL.

Judges STROUD and DIETZ concur.

WALKER v. K&W CAFETERIAS

[264 N.C. App. 119 (2019)]

GWENDOLYN DIANETTE WALKER, WIDOW OF ROBERT LEE WALKER, DECEASED EMPLOYEE, PLAINTIFF
v.
K&W CAFETERIAS, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA18-429

Filed 19 February 2019

1. Workers' Compensation—death benefits—third-party settlement—subrogation—from claimants who never received any workers' compensation benefits

Where plaintiff was awarded workers' compensation benefits for her husband's death ($333,763) and the estate subsequently settled a lawsuit against the at-fault driver ($962,500), the Industrial Commission had jurisdiction to order subrogation of portions of the third-party settlement that were the distributive shares of the decedent's adult children—even though the adult children never received any workers' compensation benefits. The Court of Appeals was bound by its decision in *In re Estate of Bullock*, 188 N.C. App. 518 (2008).

2. Workers' Compensation—death benefits—third-party settlement—subrogation lien—out-of-state funds

The Court of Appeals rejected plaintiff's argument that the Industrial Commission lacked jurisdiction to order her to distribute money "located in South Carolina and paid under South Carolina law in a South Carolina wrongful death action before a South Carolina court" pursuant to a section 97-10.2 subrogation lien on workers' compensation death benefits. Even if the money was not present in North Carolina, defendants could enforce the order under South Carolina's version of the Uniform Enforcement of Foreign Judgments Act.

3. Workers' Compensation—death benefits—third-party settlement—subrogation lien—out-of-state policies

The Industrial Commission correctly concluded that the Workers' Compensation Act subrogation provisions (N.C.G.S. § 97-10.2(f)) controlled over South Carolina's anti-subrogation law on underinsured motorist proceeds, pursuant to *Anglin v. Dunbar Armored, Inc.*, 226 N.C. App. 203 (2013).

Appeal by plaintiff from Opinion and Award entered 27 February 2018 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 January 2019.

The Sumwalt Law Firm, by Vernon Sumwalt, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Carl Newman and Roy G. Pettigrew, for defendant-appellees.

TYSON, Judge.

I. Background

Robert Lee Walker ("Decedent") was killed in a motor vehicle accident while driving a truck owned by K&W Cafeterias, Inc. ("Employer") in South Carolina on 16 May 2012. Decedent was a resident of South Carolina. Employer is a North Carolina corporation and headquartered in Winston-Salem. Employer's vehicle Decedent was driving when the accident occurred was insured under an automobile liability policy underwritten by Liberty Mutual Insurance Company ("Insurer") (Employer and Insurer collectively referred to as "Defendants"). The automobile liability policy was purchased and entered into within North Carolina.

On 21 August 2012, Decedent's widow, Gwendolyn Walker ("Plaintiff"), filed a claim for death benefits pursuant to the North Carolina Workers' Compensation Act. N.C. Gen. Stat. § 97-38 (2017). With the consent of the parties, the Industrial Commission entered an opinion and award, which included several joint stipulations, including, in relevant part:

> 1. . . . [Decedent] died as the result of a motor vehicle accident arising out of and in the course of his employment with Defendant-Employer.
>
> 2. At all relevant times, the parties hereto were subject to and bound by the provisions of the North Carolina Workers' Compensation Act.
>
> . . .
>
> 6. The North Carolina Industrial Commission has jurisdiction over the parties and the subject matter involved in this case.
>
> . . .

> 8. On the date of [Decedent's] death, [Decedent] had six children. However, all children were over the age of eighteen on the date of [Decedent's] death. . . .
>
> 11. Plaintiff Gwendolyn Dianette Walker is the widow and sole surviving dependent of [Decedent].

Based upon the parties' stipulations, and with the consent of the parties, the Industrial Commission ordered Defendants to pay Plaintiff five hundred weekly payments of $650.89 each and an additional payment of $8,318 for funeral expenses, for total anticipated benefits of $333,763.

Plaintiff was appointed the personal representative of Decedent's estate in South Carolina. On 26 August 2014, Plaintiff, as personal representative of the estate, filed a wrongful death and survival action against the at-fault driver and his father in the Horry County Court of Common Pleas in South Carolina. In March 2016, Plaintiff, the at-fault driver and his father settled the lawsuit and Plaintiff received a total of $962,500 under the settlement ("the third-party settlement"). The total settlement amount of $962,500 came from the following sources:

> 1. $50,000 in liability benefits from the at-fault driver's insurer;
>
> 2. $12,500 in personal underinsured motorist ("UIM") coverage covering Plaintiff and Decedent's own personal vehicle from Plaintiff's own automobile insurance carrier; and
>
> 3. $900,000 in commercial UIM coverage covering the vehicle Decedent was driving when the accident occurred from Employer's automobile insurance carrier, Insurer.

On 21 March 2016, Defendants filed a Form 33 request for hearing with the North Carolina Industrial Commission seeking a subrogation lien against $333,763 of the $962,500 Plaintiff had received from the third-party settlement. On 30 March 2016, Plaintiff filed a declaratory judgment action in the Horry County Court of Common Pleas in South Carolina seeking a declaration of "whether the Defendants are entitled to assert a claim against any and all settlement proceeds, including those settlement proceeds paid under the [underinsured motorist] coverage."

Defendants removed Plaintiff's declaratory judgment action to the United States District Court for the District of South Carolina based upon the diversity of state citizenship of the parties on 2 May 2016. On 13 June 2016, Plaintiff filed a motion with the North Carolina Industrial

Commission to stay the proceedings, pending the outcome of the declaratory judgment action in the United States District Court. The Industrial Commission denied Plaintiff's motion to stay the proceedings by an order filed 28 June 2016.

On 28 July 2016, Plaintiff filed an appeal for a hearing before a deputy commissioner. Before the scheduled hearing, "the parties jointly requested that in lieu of testimony, they be allowed to try the case on stipulated facts and exhibits with the submission of briefs and proposed decisions[.]" Plaintiff argued South Carolina law controlled over North Carolina law to the extent South Carolina forbids subrogation of UIM proceeds for workers' compensation benefits under S.C. Code § 38-77-160.

On 10 July 2017, the deputy commissioner filed an opinion and award ruling in favor of Defendants and requiring Plaintiff to apply the $962,500 from the third-party settlement to satisfy Defendants' $333,763 subrogation lien. Plaintiff appealed the deputy commissioner's opinion and award to the full Industrial Commission ("the Full Commission").

On 26 January 2018, while Plaintiff's appeal to the Full Commission was pending, the United States District Court entered an order holding it "will abstain from exercising jurisdiction over [Plaintiff's] declaratory action, and will dismiss it without prejudice to the parties pursuing their claims before the Industrial Commission and the North Carolina appellate courts."

On 27 February 2018, the Full Commission issued an opinion and award. The Full Commission found, in relevant part:

> 3. . . . Decedent was killed when his vehicle was struck by another vehicle operated by . . . "third parties," as defined in . . . N.C. Gen. Stat. § 97-10.2(a).
>
> . . .
>
> 12. Under the terms of the Consent Opinion and Award, Plaintiff and Defendants stipulated to the Industrial Commission's jurisdiction over Plaintiff's workers' compensation claim. Furthermore, N.C. Gen. Stat. §§ 97-91 and 97-10.2 confer[] the Industrial Commission with personal jurisdiction over Plaintiff and subject matter jurisdiction over all aspects of the workers' compensation claim, including Defendant's lien.
>
> . . .

> 14. Plaintiff conceded in her brief to the Deputy Commissioner that the distribution formula in N.C. Gen. Stat. § 97-10.2(f) would apply to the $50,000.00 in liability insurance proceeds.
>
> 15. Plaintiff's $900,000.00 in commercial UIM proceeds were paid pursuant to a North Carolina liability policy. While the policy contains a South Carolina endorsement (as well as endorsements or financial responsibility identification cards for Florida, West Virginia, and Virginia), the UIM policy was made in North Carolina, was paid pursuant to the provisions of a North Carolina policy, and is subject to the laws of this State.

The Full Commission concluded Defendants were entitled to a subrogation lien on the entire third-party settlement proceeds "and not just [Plaintiff's] share of the Third-Party Recovery." The Full Commission's opinion and award directed the distribution of the third-party settlement amount of $962,500 as follows:

> a. The sum of $5,921.91 shall be paid to Plaintiff's counsel for payment of actual costs pursuant to N.C. Gen. Stat. § 97-10.2(f)(1)(a);
>
> b. The sum of $320,833.33 shall be paid to Plaintiff's counsel for payment of attorney's fees pursuant to N.C. Gen. Stat. § 97-10.2(f)(1)(b);
>
> c. The sum of $222,507.63 shall be paid to Defendants pursuant to N.C. Gen. Stat. § 97-10.2(f)(1)(c) and (f)(2); and
>
> d. The remaining sum of $413,237.13 shall be paid to Plaintiff pursuant to N.C. Gen. Stat. § 97-10.2(f)(1)(d).

Plaintiff filed timely notice of appeal to this Court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 97-86 (2017).

III. Issues

Plaintiff argues: (1) the Full Commission exceeded its subject matter jurisdiction by ordering the distribution of out-of-state UIM proceeds to satisfy a workers' compensation lien, when the proceeds were shares of an out-of-state wrongful death recovery for some recipients who

never received workers' compensation benefits under North Carolina law; (2) the UIM insurance proceeds were paid under South Carolina insurance policies; and (3) S.C. Code. § 38-77-160 immunizes the South Carolina UIM proceeds from all subrogation.

IV. Standard of Review

An opinion and award from the Industrial Commission is reviewed to determine:

> (1) whether its findings of fact are supported by any competent evidence in the record; and (2) whether the Industrial Commission's findings of fact justify its legal conclusions. The Industrial Commission's conclusions of law are reviewable de novo by this Court.

Moore v. City of Raleigh, 135 N.C. App. 332, 334, 520 S.E.2d 133, 136 (1999) (citation and quotation marks omitted).

"Whether North Carolina law or South Carolina law governs is a question of law which we review *de novo*." *Anglin v. Dunbar Armored, Inc.*, 226 N.C. App. 203, 206, 742 S.E.2d 205, 207 (2013).

V. Analysis

A. *In re Bullock*

[1] Plaintiff acknowledges she "does not dispute that Defendants have a workers' compensation lien." Plaintiff argues the Full Commission exceeded its subject matter jurisdiction "to the extent that the Full Commission held that the workers' compensation lien extends to funds other than [Plaintiff's] share of the wrongful death recovery[.]"

N.C. Gen. Stat. § 97-10.2 (2017) provides authority for an employer to obtain a subrogation lien for workers' compensation benefits paid by the employer against amounts recovered from and against a third-party tortfeasor. The statute provides, in relevant part:

> (f)(1) . . . if an award final in nature in favor of the employee has been entered by the Industrial Commission, *then any amount obtained by any person by settlement with, judgment against*, or otherwise from the third party by reason of such injury or death *shall* be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:
>
> . . .

> c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.
>
> . . .
>
> (h) *In any . . . settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest* under (f) hereof upon any payment made by the third party by reason of such injury . . . . and such lien may be enforced *against any person receiving such funds*.

N.C. Gen. Stat. §§ 97-10.2(f)(1), (h) (emphasis supplied).

Plaintiff contends the Full Commission lacks subject matter jurisdiction to order subrogation of the portions of the third-party settlement that are the distributive shares of the wrongful death recovery of Decedent's six adult children.

Plaintiff acknowledges this Court's binding and prior published opinion in *In re Estate of Bullock*, 188 N.C. App. 518, 655 S.E.2d 869 (2008). Plaintiff states "*Bullock* is the only opinion indicating that the distributive shares of a wrongful death recovery can be used to satisfy a workers' compensation lien, even when the recipients of that recovery never received workers' compensation."

In *Bullock*, a construction worker was killed in the course of his employment. *Bullock*, 188 N.C. App. at 519, 655 S.E.2d at 870. The decedent construction worker was not married and had no children. *Id*. The decedent's girlfriend and his two minor nephews had lived with him prior to his death. *Id*. The decedent died intestate and his only heir, pursuant to the Intestate Succession Act, was his mother. *Id*.

The construction worker's family members filed a workers' compensation claim for death benefits. *Id*. The Industrial Commission issued an opinion and award finding that the minor nephews were wholly and fully dependent on the decedent for support and that they were the only persons entitled to receive death benefits. *Id*.

The decedent's estate separately brought a wrongful death claim against the dump truck driver, who had run over decedent, and the driver's employer. After the decedent's estate entered into a settlement agreement of the wrongful death claim with the dump truck driver and the driver's employer, the estate sought approval of the agreement by

the trial court. *Id.* The decedent's employer and insurer filed a motion seeking to set aside the settlement agreement and for a declaration they possessed a workers' compensation lien on the settlement proceeds. *Id.*

The trial court denied decedent's employer and insurer's motion to set aside the settlement agreement, approved the settlement agreement, and ruled in part that the decedent's employer and its insurance carrier did not have a valid workers' compensation lien on the settlement proceeds. *Id.* at 520-21, 655 S.E.2d at 871.

This Court reversed the trial court's ruling. *Id.* at 521, 655 S.E.2d at 871. The Court analyzed the plain language of N.C. Gen. Stat. § 97-10.2 and held the decedent's employer and insurance carrier had "a statutory lien against *any* payment made by a third-party tortfeasor arising out of an injury or death of an employee subject to the [Workers' Compensation] Act." *Id.* at 524, 655 S.E.2d at 873 (emphasis in original). This Court also held "[t]his lien may be enforced against '*any* person receiving such funds.' " *Id.* (quoting N.C. Gen. Stat. § 97-10.2(h)) (emphasis in original)).

In reaching its holding, this Court stated:

> Although the General Assembly expressly subrogated the rights of an employer's insurance carrier to that of an employer, *see* N.C. Gen. Stat. § 97-10.2(g), we find no language in section 97-10.2 subrogating the rights of an employer to that of the beneficiaries of the workers' compensation award. If the General Assembly intended to subrogate the employer's rights to that of the beneficiaries of the award, they would have done so expressly as they did in subsection (g). Instead, the extent of an employer's subrogation interest under subsection (f) is measured by compensation paid or to be paid by the employer.

Id.

Bullock holds that even though the beneficiaries under the third-party wrongful death claim never received any workers' compensation benefits, they were nevertheless subject to the subrogation lien statute under N.C. Gen. Stat. § 97-10.2(h). *See id.*

Plaintiff does not contend that *Bullock* is distinguishable from the matter at hand nor does she argue *Bullock* is not controlling. Plaintiff instead contends that *Bullock* was wrongly decided and places her, as the personal representative of Decedent's estate, in a conflict of interest *vis-à-vis* Decedent's six adult children. Plaintiff requests that "[t]o the

extent that the Court feels obligated to follow *Bullock*, which produces this conflict of interest, [Plaintiff] asks the panel members of the Court for at least a dissenting opinion[.]"

The Supreme Court of North Carolina and this Court have long recognized that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). This Court recently discussed *In re Civil Penalty* in *State v. Gonzalez* and stated:

> *In re Civil Penalty* stands for the proposition that, where a panel of this Court has decided a legal issue, future panels are bound to follow that precedent. This is so even if the previous panel's decision involved narrowing or distinguishing an earlier controlling precedent—even one from the Supreme Court—as was the case in *In re Civil Penalty*. Importantly, *In re Civil Penalty* does not authorize panels to overrule existing precedent on the basis that it is inconsistent with earlier decisions of this Court.

State v. Gonzalez, __ N.C. App. __, __, __ S.E.2d __, __, 2019 WL 189853 at *3 (2019).

This Court is bound by our prior holding in *Bullock*. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. Any recovery obtained by "any person receiving such funds" through a wrongful death claim against third parties is subject to a subrogation lien under N.C. Gen. Stat. § 97-10.2(h) when workers' compensation benefits have been advanced because of a covered employee's death, even if the claimants never received any workers' compensation benefits. *Bullock,* 188 N.C. App. at 524, 655 S.E.2d at 873.

Being bound by *In re Civil Penalty*, we are without authority to overturn a prior panel of this Court. 324 N.C. at 384, 379 S.E.2d at 37. Plaintiff's argument is overruled.

B. *Jurisdiction Over Property Located Outside North Carolina*

[2] Plaintiff argues that "[e]ven if the Industrial Commission could reach the property belonging to non-'employees' and non-'dependents' under N.C. Gen. Stat. § 97-10.2, the Commission cannot exercise its jurisdiction to affect the rights to that property when it is located outside of North Carolina."

Plaintiff asserts the UIM proceeds are "located in South Carolina and paid under South Carolina law in a South Carolina wrongful death action before a South Carolina court" and the Industrial Commission lacks *in rem* jurisdiction over the proceeds and lacks the jurisdiction to order distribution of the UIM proceeds.

Plaintiff does not contend the Industrial Commission lacked *in personam* jurisdiction over her. Plaintiff jointly stipulated with Defendants to the North Carolina Industrial Commission that "[*a*]*ll parties are properly before the Industrial Commission* and the Industrial Commission has subject matter jurisdiction over this matter." (Emphasis supplied). Regarding the location of the funds from the third-party settlement, the parties stipulated "Plaintiff's attorneys are currently holding the entirety of Plaintiff's $962,500.00 from the Third-Party Recovery in their trust account."

" '*In rem*' proceedings encompass any action brought against a person in which essential purpose of suit is to determine title to or affect interests in specific property located within territory over which court has jurisdiction." *Green v. Wilson*, 163 N.C. App. 186, 189, 592 S.E.2d 579, 581 (2004) (quoting *Black's Law Dictionary* 793 (6th ed. 1990)). In *Green*, this Court recognized

> that a foreign court with *in personam* jurisdiction could render judgments that indirectly affect ownership of property over which that court would have no *in rem* jurisdiction in certain specific instances. However, a court in a jurisdiction foreign to the subject property could not determine title to the property. An example of the former would be an equitable distribution in which the divorcing couple hold property in North Carolina but bring the divorce action in another state. The foreign court would have the authority, under principles of *in personam* jurisdiction, to divide the commonly held title. But where the ownership of the deed is in dispute or there is a cloud on the title, a court must have *in rem* jurisdiction to decide such matters.

Id. "By means of its power over the person of the parties before it, a court may, in proper cases, compel them to act in relation to property not within its jurisdiction, but its decrees do not operate directly upon the property nor affect its title." *McRary v. McRary*, 228 N.C. 714, 718, 47 S.E.2d 27, 30 (1948).

The Industrial Commission acted within its proper and stipulated personal jurisdiction over Plaintiff to order her to distribute the amount she had obtained from the third-party settlement in accordance with N.C. Gen. Stat. § 97-10.2. Even if the $962,500 from the third-party settlement is not present within North Carolina, Defendants may enforce the Commission's opinion and award in South Carolina under South Carolina's version of the Uniform Enforcement of Foreign Judgments Act, S.C. Code. §§ 15-35-900 to -960 (2018).

Plaintiff's argument is also suspect in light of her stipulation that the Industrial Commission's order of distribution could be applied to the $50,000 portion of the third-party settlement obtained from the liability insurance proceeds from the at-fault driver's South Carolina insurance policy. It is uncontested by the parties that the $50,000 portion of the third-party settlement from the liability insurance proceeds is located within South Carolina, was obtained from a South Carolina insurance policy from the wrongful death action brought in South Carolina. Plaintiff's argument is overruled.

C. *Anglin v. Dunbar Armored*

[3] The Full Commission's opinion and award also relied, in part, upon this Court's opinion in *Anglin v. Dunbar Armored, Inc.*, 226 N.C. App. 203, 742 S.E.2d 205 (2013), to conclude North Carolina law allowing for subrogation liens over third-party wrongful death awards in workers' compensation cases applies in this situation.

The Commission concluded, in part:

> 2. Under traditional conflict of laws rules, matters affecting the parties' substantive rights are determined by *lex loci*, the law of the situs of the claim, while procedural or remedial issues are determined by the *lex fori*, or law of the forum where the remedy is sought . . . It is well-established that rights arising from the subrogation lien under N.C. Gen. Stat. § 97-10.2 are remedial or procedural in nature, not substantive. . . . Therefore, the forum where relief is sought is North Carolina, specifically, the Industrial Commission. . . . Thus, N.C. Gen. Stat. § 97-10.2, rather than South Carolina law, controls the rights of parties concerning Defendants' statutory subrogation lien. *Anglin v. Dunbar Armored* 226 N.C. App. 203, 209-10, 742 S.E.2d 205, 209 (2013).

Plaintiff asserts "[i]n *Anglin*, the Court considered if the proceeds from a South Carolina UIM policy affected the *existence* of a workers' compensation lien under North Carolina Law against those proceeds[,]" but did not consider how parties may attach property to satisfy the lien.

In *Anglin*, a South Carolina resident who worked for Dunbar Armored, Inc., a company doing business out of North Carolina, was injured in the course and scope of his employment in an automobile accident which occurred in South Carolina. 226 N.C. App. at 204, 742 S.E.2d at 206. The injured employee received workers' compensation benefits from Dunbar under the North Carolina Workers' Compensation Act. *Id.* The injured employee subsequently settled a liability claim with the at-fault driver. *Id.*

Dunbar agreed to settle its subrogation lien on the liability settlement for one-third of the amount of the lien. *Id.* A few months later, the injured employee settled with his UIM insurance carrier. *Id.* Dunbar was unaware of the UIM funds at the time it settled its lien with the injured employee. *Id.*

The injured employee then filed a complaint in superior court seeking "declaratory relief and to eliminate or reduce [Dunbar's] subrogation interest[,]" pursuant to N.C. Gen. Stat. § 97-10.2(j). *Id.* The injured employee "contend[ed] that South Carolina law applies because [he] was entitled to UIM funds pursuant to a South Carolina Policy." The employee further contended that Dunbar could not subrogate UIM funds under South Carolina law, S.C. Code Ann. § 38-77-160. *Id.* The trial court ruled, in part, that North Carolina law applied over South Carolina law and that Dunbar was entitled to the full amount of its subrogation lien. *Id.*

On appeal, this Court analyzed the case of *Cook v. Lowe's Home Centers, Inc.*, 209 N.C. App. 364, 704 S.E.2d 567 (2011), which had held "that N.C. Gen. Stat. § 97-10.2(j) 'is remedial in nature' and that 'remedial rights are determined by the law of the forum.' " *Anglin*, 226 N.C. App. at 207, 742 S.E.2d at 208 (quoting *Cook*, 209 N.C. App. at 367-68, 704 S.E.2d at 570-71).

This Court reasoned in *Cook*:

> As to substantive laws, or laws affecting the cause of action, the *lex loci*—or law of the jurisdiction in which the transaction occurred or circumstances arose on which the litigation is based—will govern; as to the law merely going to the remedy, or procedural in its nature, the *lex*

> *fori*—or law of the forum in which the remedy is sought—will control.
>
> Where a lien is intended to protect the interests of those who supply the benefit of assurance that any work-related injury will be compensated, *it is remedial in nature*. A statute that provides a remedial benefit must be construed broadly in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained.

Cook, 209 N.C. App. at 366-67, 704 S.E.2d at 569-70 (emphasis supplied) (citations, quotation marks, ellipses, and brackets omitted).

Following *Cook*, this Court held in *Anglin* that because "N.C. Gen. Stat. § 97-10.2(j) is remedial in nature and remedial rights are determined by the law of the forum[,] . . . the trial court did not err in applying N.C. Gen. Stat. § 97-10.2(j) to [the injured employee's] UIM funds received under a South Carolina insurance policy." *Anglin*, 226 N.C. App. at 209-10, 742 S.E.2d at 209 (citation and internal quotation marks omitted) (alteration in original); *see Robinson v. Leach*, 133 N.C. App. 436, 514 S.E.2d 567 (determining that subrogation rights on UIM funds are procedural in nature and controlled by the law of North Carolina as the forum state).

This Court affirmed the trial court's judgment that North Carolina law applied to allow subrogation of UIM proceeds procured under an out-of-state UIM policy and that Dunbar was entitled to the remaining proceeds from the lien on the UIM funds. *Id.* at 205, 742 S.E.2d at 207.

Anglin involved a proceeding brought in the trial court pursuant to N.C. Gen. Stat. § 97-10.2(j) of the Workers' Compensation Act. The instant case concerns whether the Industrial Commission possessed the authority to award a subrogation lien to Defendants and order disbursement pursuant to N.C. Gen. Stat. § 97-10.2(f). The reasoning this Court applied in *Cook*, and followed in *Anglin*, to N.C. Gen. Stat. § 97-10.2(j) is applicable here. N.C. Gen. Stat. § 97-10.2(f) is remedial in nature because it provides for "a lien [] intended to protect the interests of those who supply the benefit of assurance that any work-related injury will be compensated." *Cook*, 209 N.C. App. at 366-67, 704 S.E.2d at 569-70.

North Carolina is the forum state in this dispute, and N.C. Gen. Stat. § 97-10.2(f) is remedial in nature. The precedents hold our statute applies over South Carolina law to grant Defendants a subrogation lien on the UIM proceeds recovered in the third-party settlement. *See Anglin*, 226 N.C. App. at 209-10, 742 S.E.2d at 209.

Plaintiff contends that because the UIM policies were South Carolina policies, the Industrial Commission erred in concluding that N.C. Gen. Stat. § 97-10.2(f) applied over South Carolina's anti-subrogation law on UIM proceeds, S.C. Code. § 38-77-160. Plaintiff asserts the commercial UIM policy, though purchased and issued in North Carolina, is a South Carolina policy because of an endorsement attached thereto, which states:

> THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
>
> SOUTH CAROLINA UNDERINSURED MOTORIST COVERAGE
>
> For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in, South Carolina, this endorsement modifies insurance provided under the following:
>
> BUSINESS AUTO COVERAGE FORM
>
> GARAGE COVERAGE FORM
>
> MOTOR CARRIER COVERAGE FORM
>
> TRUCKERS COVERAGE FORM
>
> With respect to the coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement. . . .
>
> CONFORMITY TO STATUTE
>
> This endorsement is intended to be in full conformity with the South Carolina Insurance Laws. If any provision of this endorsement conflicts with that law, it is changed to comply with the law.

Plaintiff also contends that her and her decedent's personal UIM policy was also a South Carolina policy "because it insured the Walkers as South Carolina residents with vehicles located in that state."

Presuming, *arguendo*, as Plaintiff asserts, the UIM policies are South Carolina policies, North Carolina's subrogation law applies over South Carolina law as the law of the forum state, pursuant to *Anglin*. *See Anglin*, 226 N.C. App. at 209-10, 742 S.E.2d at 209. The UIM policy at issue in *Anglin* was a South Carolina policy, the injured employee was a South Carolina resident, and the automobile accident occurred in South Carolina. *Id*. at 204, 742 S.E.2d at 206. This Court held North Carolina

law, allowing for subrogation over the UIM policy proceeds, controlled over South Carolina law, and affirmed the trial court's order. *Id.* at 205, 742 S.E.2d at 207. Plaintiff's argument is overruled.

VI. Conclusion

The Full Commission correctly concluded Defendants could assert a subrogation lien for workers' compensation benefits paid to Plaintiff on the UIM policy proceeds obtained by Plaintiff in the South Carolina wrongful death action. The Industrial Commission possessed the jurisdiction to order disbursement of the third-party settlement proceeds. The opinion and award of the Industrial Commission is affirmed. *It is so ordered.*

AFFIRMED.

Judges STROUD and ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 FEBRUARY 2019)

CALDWELL MEM'L HOSP., INC. v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 18-586	Office of Admin. Hearings (17DHR05373)	Affirmed
CANNIZZARO v. SET IN STONE, INC. No. 18-594	Iredell (16CVD990)	Affirmed
CHEATHAM v. TOWN OF TAYLORTOWN No. 18-625	Moore (16CVS374)	Affirmed
FUNDERBURK v. CITY OF GREENSBORO, N.C. No. 18-632	Guilford (17CVS5607)	Affirmed
HAMPTON v. N.C. DEP'T OF TRANSP. No. 18-684	N.C. Industrial Commission (TA-21605)	Affirmed
IN RE A.W. No. 18-877	New Hanover (18JA57)	Dismissed
IN RE D.P. No. 18-857	Wake (16JA96-98)	Affirmed
IN RE J.E.O. No. 18-585	Onslow (09JT6)	Affirmed
IN RE K.S. No. 18-763	Orange (15JA87)	Vacated in part and remanded
IN RE P.R.T. No. 18-730	Guilford (16JT304)	Reversed
KING v. PIKE ELEC. No. 18-440	N.C. Industrial Commission (15-748197) (I.C.)	Affirmed
NORDMAN v. NORDMAN No. 18-405	Iredell (14CVD738)	Vacated in part, Affirmed in part, and remanded.
ROBINSON v. GGNSC HOLDINGS, LLC No. 18-706	Pitt (16CVS2712)	Affirmed

STATE v. BRINKLEY No. 18-435	Johnston (15CRS54051) (15CRS54165)	No error in part, Reversed and Remanded in part.
STATE v. BRYAN No. 18-605	Cumberland (16CRS63076-78)	Vacated and Remanded
STATE v. BUNKLEY No. 18-545	Cumberland (13CRS52130) (15CRS50641) (16CRS59403)	Affirmed; Remanded for correction of clerical error
STATE v. EVERETT No. 18-449	Scotland (16CRS52631)	No error in part; Vacated in part
STATE v. FOSTER No. 18-540	Polk (17CRS50042-43) (17CRS50046)	Affirmed
STATE v. LITTLE No. 18-757	Mecklenburg (16CRS244470) (16CRS245167) (17CRS13739)	No Error
STATE v. LOGAN No. 18-723	McDowell (17CRS246) (17CRS50159) (17CRS50466)	Dismissed
STATE v. RENDEROS No. 18-590	Wake (15CRS212057)	No Error
STATE v. ROBINSON No. 18-661	Mecklenburg (16CRS225641) (16CRS29781)	Affirmed
STATE v. SADLER No. 18-812	Mecklenburg (14CRS232621)	No error in part; Dismissed in part
STATE v. SLADE No. 18-352	Alamance (14CR51986)	Vacated
STATE v. WARD No. 18-369	Forsyth (15CRS55900) (16CRS2451)	NO PLAIN ERROR.
STATE v. WARDRETT No. 18-434	Nash (16CRS51053)	Dismissed in part; no error in part.

STATE v. WHITMORE No. 18-798	Halifax (15CRS358-59)	No error in trial; remanded for resentencing.
STATE v. WOODS No. 18-442	Guilford (17CRS24156-57) (17CRS66077-78)	Dismissed

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